SUPREME COURT OF THE UNITED STATES.

No. 266.

SELDEN S. WALKLEY, APPELLANT,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF MUSCATINE, AND THE CITY OF MUSCATINE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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1 Proceedings before the circuit court of the United States in and for the district of Iowa, at a term thereof begun and holden at Des Moines, on the second Tuesday of May, A. D. 1866.

Be it remembered that on the 21st day of April, A. D. 1865, a petition was filed in the office of the clerk of the said circuit in the words and figures following, to wit:

Bill.

In the circuit court of the United States for the district of Iowa.

SELDEN S. WALKLEY
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF Muscatine and the City of Muscatine. } Creditor's bill.

To the judges of the circuit court of the United States for the district of Iowa:

Selden S. Walkley, a citizen of the State of Pennsylvania, brings this his bill against the city of Muscatine, a municipal corporation, created by, and a citizen of, the State of Iowa, and the mayor and aldermen of said city, citizens of the State of Iowa. And

2 thereupon your orator complains that on the 13th day of August, A. D. 1855, the mayor and aldermen of said city of Muscatine, in pursuance of authority vested in said corporation by their charter, did submit to the qualified voters of the city of Muscatine, the following proposition, to wit:

To authorize the city council of Muscatine to borrow for a term of years, not exceeding twenty, on the bonds of the city, at a rate of interest not higher than ten per cent. per annum, the sum of one hundred and thirty thousand dollars, to be subscribed as stock in the name of the city, to the capital stock of the Mississippi and Missouri Railroad Company.

That, upon an election held on that day, a majority of the qualified voters of said town voted in favor of said proposition, and the city council issued one hundred and thirty thousand dollars in bonds, bearing ten per cent. interest, payable in twenty years, with interest at ten per cent., payable half yearly, and said bonds were sold and delivered to various parties.

That the plaintiff, being the owner of divers of said bonds, and the interest thereon not having been paid, commenced his action at law in this court for the recovery of the unpaid interest on certain of said bonds held by him against the city of Muscatine, and such

3 proceedings were thereupon had that on the 20th day of October, eighteen hundred and sixty-four, judgment was rendered in favor of the plaintiff for the sum of seven thousand and six hundred and sixty-six dollars, with six per cent. interest, and cost taxed at $51. That execution has been issued upon said judgment and returned "no property found," as by the records and proceedings of this court, now open to inspection, will fully appear.

That the city of Muscatine has no property which is liable to ex-

ecution at law on said judgment; that the said mayor and aldermen have been requested to levy a tax to pay said judgment, and have neglected and refused so to do.

That the said city of Muscatine and the mayor and aldermen thereof are authorized by their charter to levy a tax of one per cent. on the valuation of the property of said city, and such a tax has been, and usually is, levied by the mayor and aldermen every year. That said tax constitutes the chief source of revenue for said city, and yearly amounts to a sum sufficient to pay said judgment, interest, and cost.

That said city, and its said mayor and aldermen, have ever since the interest which was due on said bonds, and which was recovered in said judgment, have appropriated their revenues to other
4 purposes, and have totally neglected to pay said interest before judgment, or said judgment after its rendition.

Your petitioner is without adequate remedy at law; the corporation of Muscatine is insolvent and unable to pay its debts from any other sources than such revenue as it may derive from taxation.

Your petitioner prays that the city of Muscatine and its mayor and aldermen may be ordered, adjudged, and decreed to levy a tax of one per cent. on the valuation of the property of said city for the year 1865, and to appropriate so much of the same as may be necessary to pay said judgment, interest, and cost; that they, the said mayor and aldermen, may be restrained from appropriating any of their city revenue to any other purpose than the payment of said judgment until the same is satisfied; and for such other and further relief as the nature of his case may require.

SEDDEN S. WALKLEY,
By J. GRANT, *Solicitor.*

Affidavit.

STATE OF IOWA, *Scott county:*

I, James Grant, declare on oath that I am solicitor of the plaintiff; that I recovered the judgment named in the petition; that I
5 have read the records of the city of Muscatine, in relation to the bonds referred to in the petition; that I have better means of knowing the facts named in the petition than my client; and that I verily believe the facts stated in the petition are true.

JAMES GRANT.

Sworn to and subscribed by James Grant, before me, this 12th April, 1865.

Witness my hand and seal notarial the day and year last above written.

[SEAL.]

S. F. SMITH,
Notary Public, Scott County, Iowa.

Demand.

DAVENPORT, IOWA, 12*th April*, 1865.

To the mayor and aldermen of the city of Muscatine.

GENTLEMEN: On the 20th of October, 1864, I recovered judgment against the corporation of Muscatine, in the circuit court of

6 the United States for the district of Iowa, for the sum of $7,659 83, interest and cost. On this judgment I have caused execution to be issued, and it has been returned "no property found."

By your charter you are authorized to levy a tax of one per cent. per annum. You have neglected, as to the debt on which I recovered judgment, to apply any part of your revenue to the payment of the judgment.

I now demand of you that you levy and set apart a part sufficient of your ordinary revenue to pay said judgment, interest, and cost, or that you levy a specific tax for that purpose.

Your ob't s'v't,

SELDEN S. WALKLEY,
By GRANT & SMITH, *his Attorneys.*

And afterward, on the 22d day of July, A. D. 1865, a writ of subpœna was issued in the words and figures following, to wit:

7 *Subpœna.—55 eq.*

UNITED STATES OF AMERICA, *District of Iowa, ss:*

The President of the United States to the mayor and aldermen of the city of Muscatine, in the State of Iowa, greeting: We command you and each of you, that you appear before the judges of the circuit court of the United States for the district of Iowa, at Des Moines, on the first Monday, it being the fourth day of September next, A. D. 1865, to answer to the bill of complaint of Seldin S. Walkley, a citizen of the State of Pennsylvania, in equity, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Iowa:

Returnable to the first Monday of September, A. D. 1866.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the U. S. at Des Moines, this the 22d day of July, A. D. 1865, and of the independence the 90th year.

[SEAL.] S. G. WOODWARD, *Clerk.*

Memorandum.

The within named defendants are notified that unless they enter their appearance in the clerk's office of said court at Des Moines, aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

W. G. WOODWARD, *Clerk.*

Return.

Which writ of subpœna is indorsed as follows:

"Returnable to rule day, first Monday in September, A. D. 1865.

"Filed Sept. 4, A. D. 1865.

"W. G. WOODWARD, *Clerk.*"

"AUG. 28, 1865.

"Service of the within writ this day accepted. Appearance entered for Sept'r 4th, 1865.

"WM. F. BRANNAN, *Att'y for Def'ts.*"

And on the first Monday of September, 1865, Wm. F. Brannan, esq., entered his appearance for the defendants.

8 And afterwards, on the 3d day of October, 1865, was filed an answer in the same cause, as follows, viz:

Answer.

In the circuit court of the United States for the district of Iowa.

SELDEN S. WALKLEY
v.
THE CITY OF MUSCATINE and THE MAYOR AND Alderman thereof. } Answer.

The answer of the mayor and aldermen of the city of Muscatine to the bill of complaint of the said Selden S. Walkley against them and the city of Muscatine, in the said court exhibited.

These defendants, now and at all times hereafter saving and reserving to themselves all benefit and advantage of exception to the many errors and uncertainties and other imperfections in the said bill of complaint, for answer thereunto, or unto so much and such parts thereof as these defendants are advised it is material or necessary for them to answer unto, answering say—

1st. That they admit that on the 13th day of August, A. D. 1855, at an election called for that purpose by the city

9 council of the city of Muscatine, aforesaid, the proposition stated in said bill of complaint, to wit, "to borrow for a term of years not exceeding twenty, on the bonds of the city, at a rate of interest not exceeding ten per centum per annum, the sum of one hundred and thirty thousand dollars, to be subscribed as stock, in the name of the city, to the capital stock of the Mississippi and Missouri Railroad Company," was, by the said council, submitted to the voters of said city; that a majority of the persons voting at said election voted affirmatively on said proposition; that sometime thereafter the bonds of said city, to the amount of one hundred and thirty thousand dollars at ten per cent. interest, payable semi-annually in New York, were, by the direction of the said city council, issued and delivered to the said railroad company, but they deny that the submission of said proposition was in pursuance of authority vested in the said city by its charter; and they aver that the said proposition,

and the submission of the same to the voters of said city without the warrant or sanction of law, was for objects and purposes entirely foreign to the objects and purposes for which said corporation was created and intended, and that the same was and is wholly unauthorized by the charter aforesaid.

10 2d. They admit that judgment was rendered against said city on the law side of this court and in favor of said complainant for unpaid interest on some of said bonds at the time and for the amount stated in said bill of complaint; that execution has been issued on said judgment, and that the same has been returned wholly unsatisfied.

3d. These defendants, further answering, say, that the said city council is, by the charter of said city, prohibited from levying and collecting any greater sum than one per cent. upon the valuation of property in said city, subject to general city taxes; that the said city council, before they had any knowledge of the institution of this suit, and before service of the same was had upon them, had levied a tax of one per centum upon the value of all property subject to taxation for general city purposes; that such levy was made August 5th, 1865, and is for the current year, but recently commenced; that the total valuation of the property in said city, subject to taxation for the general municipal purposes is, as shown by the return of the assessor of said city, one million and eight hundred and ninety thousand one hundred and seventy-five dollars, ($1,890,175;) that the total amount of revenue upon this valuation, if the same should be collected, which is altogether improbable, would be, on the levy of one per cent., eighteen thousand and nine hundred and one $\frac{75}{100}$

11 dollars.

4th. They further say, that of the aforesaid sum of one per cent. levied by the said city council for the purposes of revenue, five mills, or the one-half thereof, has been appropriated and set apart especially for work, labor, and material, on the roads, streets, and alleys in said city, and the residue for other city purposes, including the payment of debts and liabilities owing by the city. They further say, that the road and street tax has always been a separate, distinct, and special charge, as well before the incorporation of said city as since; that the revenue arising therefrom has always been kept separate and distinct from other sources of revenue, and that all persons charged with taxes for roads, streets, &c., have, under the general law of the State of Iowa, as well as the local law of the city of Muscatine, the right to pay the same by work and labor done on said roads, streets, &c., at such times and in such places as the proper officer, who, in the city aforesaid, is the street commissioner, may direct; that more or less of this last-mentioned tax is always paid by work or labor done by, or on behalf of, the persons charged with such tax. These defendants, further answering, say that they have entered on these brief details concerning the said road tax for the purpose of showing that the same is levied for, and applied to, a special purpose; and that, from the manner in which the same can be, and by many persons is, paid, no certain revenue can arise

12 therefrom. They further say that the road tax for the current year is much greater than it has been for any previous year, in consequence of a largely increased expenditure on account of the broken and unsafe condition of the streets and roads of said city in many places; of constructing a new bridge across Pappoose creek near the heart of the city, and the preparation of the principal business street in said city for permanent pavement; nearly eight thousand dollars have been absorbed in work done and expenses incurred in putting the public thoroughfares of said city in repair and good condition during the present season, the greater part of which will have to be met by the tax levied for the current year. They further say that by the most economical management, they will scarcely have money left for the streets to last until the next annual levy in July next.

5th. These defendants, further answering, say that the chief, and almost the only source of revenue upon which the said city can depend for the support of its government and the furtherance of the objects for which it was incorporated, and the payment of its debts, is derived from taxes; that the total amount of revenue, if the same is all collected, (which is hardly possible,) from this source, for the current year, applicable and set apart for general city purposes, (exclusive of the roads, streets, &c.,) will be nine thousand and four

13 hundred and fifty and $\frac{87}{100}$ dollars, ($9,450 87;) that from licenses, shows, &c., the city may possibly realize some four hundred dollars more; that all of this sum will be needed for municipal purposes and the protection of municipal property; that the cost of keeping the streets properly lighted at night, will not be less than one thousand dollars, ($1,000;) of engineering for the city, probably six hundred dollars, ($600;) of repairing and making sidewalks at the present, and probably continued high price of material and labor, about six hundred dollars, ($600;) of printing and advertising about five hundred dollars; (500;) of assessing the city, one hundred and fifty dollars, (150;) of extra police, about four hundred and fifty dollars; of rent for mayor's office and council-room, and fuel for same, two hundred and fifty dollars; of salaries of mayor, aldermen, marshal, street commissioner, and other officers of the city, about twenty-five hundred dollars, ($2,500;) that to preserve the steamboat landing or levee of said city, about which, and in the channel of the Mississippi river contiguous and leading to it, a large and formidable bar was rapidly accumulating, the council aforesaid has been compelled to erect, at a cost this season of not less than fifteen hundred dollars, ($1,500,) a rip-rap wall; that the erection of said wall was absolutely necessary to prevent the said bar from incroaching upon the channel of the said river, and diverting it from the levee aforesaid; that

14 there are many other items of expense to which the said city will be subjected, which singly do not amount to much, but which, in the aggregate, make a considerable sum. These defendants would further say that the commissions of the collector and treasurer would be one thousand dollars ($1,000) more. These defendants cannot enumerate specifically the items or amounts to which

the said city will be subjected during the current year; but they say that with the most prudent and economical administration of its affairs, with a just and proper regard for the wants and necessities of its citizens, the amount of tax levied the present year for general city purposes, will all be required for such purposes.

6th. These defendants, further answering, say that the said city is *is*, as alleged in complainant's bill, insolvent; that the amount of indebtedness due and owing by it, as stated by the mayor thereof, in his annual report, made and published in March last, is as follows:

Amount of outstanding orders	$9,960 86
Amount funded warrants at 10 per cent. semi-annually	14,983 53
Amount funded warrants at 6 per cent. semi-annually	1,500 00
Amount city scrip outstanding	380 00
	26,752 39

In addition to the above indebtedness, there is due and owing for the semi-annual interest on the said bonds, or one hundred and
15 thirty thousand dollars, the sum of one hundred and four thousand dollars, ($104,000,) and interest on the same at six per cent. per annum, the further sum of nineteen thousand and one hundred and ten dollars, ($19,110,) making a total indebtedness on said bonds, exclusive of the principal sum of one hundred and twenty-three thousand and one hundred and ten dollars, ($123,110,) and with the indebtedness exhibited by the report of the mayor above referred to, making an entire indebtedness of one hundred and forty-nine thousand and eight hundred and sixty-two dollars and $\frac{38}{100}$, ($149,862 38,) exclusive of the principal sum of said bonds, amounting to one hundred and thirty thousand dollars.

7th. These defendants further answering, say that the outstanding orders, the amount of which is given in the preceding paragraph, are held, and were taken by the tax-payers of said city, and others generally, under the belief and with the understanding implied from the uniform usage and custom of said city, that its orders and evidences of indebtedness would be receivable in payment of all general taxes as contradistinguished from road or street taxes, and all general debts or demands due to said city; that the same were given in good faith and on a valuable consideration; that to repudiate said orders and to refuse to receive them in discharge of general taxes and general debts due the city, in order that another species
16 of indebtedness, having no higher equity, and, in fact, having less equity, should be paid by having the revenues of said city especially appropriated and set apart for such payment, these defendants submit is unfair and at variance with the plainest dictates of justice.

8th. These defendants, further answering, say that at the June term, 1865, of the district court of the State of Iowa, for the county of Muscatine, a judgment was rendered against the said city, at the suit of one William C. Brewster, for the sum of seven thousand and five hundred and one dollars and $\frac{22}{100}$, ($7,501 22,) and the further sum of

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the said city will be subjected during the current year; but they say that with the most prudent and economical administration of its affairs, with a just and proper regard for the wants and necessities of its citizens, the amount of tax levied the present year for general city purposes, will all be required for such purposes.

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7th. These defendants further answering, say that the outstanding orders, the amount of which is given in the preceding paragraph, are held, and were taken by the tax-payers of said city, and others generally, under the belief and with the understanding implied from the uniform usage and custom of said city, that its orders and evidences of indebtedness would be receivable in payment of all general taxes as contradistinguished from road or street taxes, and all general debts or demands due to said city; that the same were given in good faith and on a valuable consideration; that to repudiate said orders and to refuse to receive them in discharge of general taxes and general debts due the city, in order that another species
16 of indebtedness, having no higher equity, and, in fact, having less equity, should be paid by having the revenues of said city especially appropriated and set apart for such payment, these defendants submit is unfair and at variance with the plainest dictates of justice.

8th. These defendants, further answering, say that at the June term, 1865, of the district court of the State of Iowa, for the county of Muscatine, a judgment was rendered against the said city, at the suit of one William C. Brewster, for the sum of seven thousand and five hundred and one dollars and $\frac{22}{100}$, ($7,501 22,) and the further sum of

five dollars and $\frac{15}{100}$ cost; that execution was issued thereon and has been returned "No property found;" and that a bill similar in its purposes to that of said complainant, and asking relief in a similar manner, has been filed in the last mentioned district court; that if the said district court and this court should each grant the relief severally prayed for in said bills, and each order that the revenues of said city he exclusively applied to the satisfaction of the judgment it has rendered, these defendants will be unable to obey both, and expose themselves to the penalties and consequences of contempt incurred by the impossibility of obeying opposing orders made by different tribunals of concurrent jurisdiction in relation to the same subject matter.

17 9th. These defendants, further answering, say that the said city of Muscatine is a body corporate, created by a special act of the general assembly of the State of Iowa, entitled "An act to incorporate the city of Muscatine," approved February 1st, 1851; that by the said act of incorporation and the various amendments thereto, the said city has the usual duties of a municipal corporation imposed upon it, and the usual municipal powers conferred upon it, by means of which these duties can be discharged; that the general assembly aforesaid, to guard against a reckless and extravagant expenditure of money by said city, and to protect the citizens from heavy and oppressive taxation resulting therefrom, and to confine the revenues of said city to the particular objects specified in said act of incorporation and the amendments thereto, inserted in the charter of said city a provision whereby the said city council is expressly forbidden to levy and collect taxes exceeding one per cent. on the value of the property in said city subject to taxation; that the revenue arising from this rate of taxation was deemed requisite for the support of the government of said city and the expenditures to be incurred by it in carrying out its corporate objects and purposes. And these defendants further say that the revenues of said city derived from a tax of one per cent., has hardly, if at all, for the last eight years, left any surplus to apply toward the discharge of
18 the interest due on the bonds aforesaid, or of the funded debt of said city; that the orders and scrip of said city have, since the said bonds were delivered to the said company, or at least, since the first payment of interest thereon, generally exceeded the amount of the tax levied, and that almost the only payments made for taxes, licenses, shows, &c., have been in the said orders, scrip, &c.

10th. These defendants, further answering, say that to into a history of the origin of the indebtedness of said city would be but to repeat the experience of every city in the said State on the Mississippi river; that shortly after the incorporation of the said city western immigration largely increased; that the surface of much the greater portion of said city was, and still is, very irregular and broken by long, deep, and abrupt ravines; that a large portion of the public thoroughfares of said city were from this cause impassable for teams, and, in their then condition, practically useless, and the lots situated thereon in a great measure valueless; that, to enable the

owners of lots to have access to their property, and to stimulate building thereon, and thus enhance the revenues of the said city by the increased valuation of property, and also to encourage immigration and thereby secure population and capital, the said city council, as authorized and required by said charter, ordered and undertook, with other needed improvements, a system of grades for the streets and alleys of said city, which was continued for about three
19 years with but little intermission, or until the year 1857, and, at wider intervals and in a much more cautious spirit, up to the present time; that such improvements and grading were deemed necessary for the comfort and convenience of the inhabitants of said city, and for the use and enjoyment by them of their property therein; that the cost of grading and incidental damages resulting therefrom, which the said city was, in many cases, improperly, as these defendants are advised, compelled to pay, entailed an unexpectedly large indebtedness on said city; that when the first coupons for the semi-annual interest, (to wit, six thousand and five hundred dollars on said bonds, became due and payable on the 1st day of July, 1850,) the city was compelled to borrow the larger portion of that amount for the purpose of meeting such payment and purchasing exchange on New York, where the said bonds and the interest thereon were made payable, and that all succeeding payments of such interest, and the purchase of such exchange, were entirely made with money which the said city, from the exhausted condition of its treasury, was compelled to borrow on its warrants or orders, and for which it was required to pay the highest rate of interest, thereby greatly augmenting the indebtedness arising from other causes. These defendants say that they have endeavored, as did their immediate predecessors, to keep down and lessen the expenses of said city, by engaging in no work and making no appropriations except such as seemed necessary for the interest of the said city and the wel-
20 fare of its inhabitants; that since 1859, and up to the present year, the indebtedness of the said city, except for unpaid interest on said bonds, has been constantly, though not rapidly, reducing by the retirement of the evidences of debt the said city has issued in the only just and practicable mode which its condition presented, to wit: by receiving them for all general taxes, demands, &c., due to it; that, owing to the causes hereinbefore given, and in consequence of the heavy and unusual outlays to which the said city has been and will be subjected during the present year, however much they and the tax-payers of the city may desire it, it will be impossible to make any diminution of said indebtedness at this time, much less to pay any portion of complainant's said judgment.

11th. These defendants, further answering, say, to grant the relief prayed for by said complainants bill, to wit, that the mayor and aldermen may be restrained from appropriating any of their city revenue to any other purpose than the payment of said judgment, until the same is satisfied, would be to divert the revenues from the specific objects and purposes enumerated in the charter, and to guard, protect, and promote, which it is, by the charter aforesaid, made the special

duty of these defendants; that it would be subversive of the corporate rights, the corporate powers, and the corporate duties of the city; that it would at once suspend all improvements now progressing by the city, by withdrawing the means for their completion; that it would disband the police force of the city by withholding their
21 salaries; and thus, in a populous community, invite the evil-disposed to the commission of crime and violence; that it would practically annul all the ordinances of the city adopted for its safety, good order, and prosperity, and for the health, morals, and convenience of its inhabitants, by withholding the means to enforce them; and that it would, in its effects, work a dissolution practically, if not legally, of said corporation; that proceedings similar to those instituted by complainant have, as has been stated already by another creditor of the city, been instituted in the State court of Iowa, and will come up for hearing at the October term thereof, 1865.

12th. And, further answering, these defendants say that they are anxious to discharge honestly and faithfully all the duties and obligations imposed upon them as the legislative body of said city, by the said charter; that they have, to the best of their ability, endeavored to do so; that while they earnestly desire to meet every demand, and pay off every claim against the city, they can do so only with such means as the law places at their disposal; and they further say that they are advised that they have duties and obligations enjoined upon them by the charter, as well in relation to the inhabitants of the city, as to the creditors of the city, and that they cannot be interfered with by any creditor the city in rightfully applying the funds of the city in providing for the safety, good order, and prosperity of the city, and the health, morals, and convenience of its inhabitants;
22 wherefore, these defendants say, that inasmuch as the complainant, by his bill, seeks to divert and appropriate the revenue of the city from those purposes in order that it may be applied to the payment of his own claims, and inasmuch as these defendants have not, under the duties prescribed to them by the charter, the power to neglect these, the more immediate objects of municipal care and attention, they are advised that the relief sought and prayed for in said bill is unjust to the other creditors of the city, is destructive of the ends for which it was incorporated, is against equity and good conscience, and ought not to be granted; and they ask to be hence dismissed with their costs, &c.

WM. F. BRANNAN, *Sol'r for Def'ts.*

Affidavit.

STATE OF IOWA, *Muscatine County:*

I, Benjamin Hershey, mayor of the said city, and one of the said defendants, do solemnly swear that I have heard the foregoing answer read and know the contents thereof, and that the same is true, as I verily believe.

B. HERSHEY, *Mayor.*

Subscribed and sworn to before me a notary public in and for said county, this 30th day of September, 1865. In witness whereof, I have hereunto set my hand and seal notarial.

[SEAL.] L. H. WASBURN, *Notary Public.*

[Rev. stamp.]

23 And afterward, on the 19th day of October, 1865, the following replication was filed, viz:

Replication.

SELDEN S. WALKLEY
vs.
THE CITY OF MUSCATINE. } In equity.

The plaintiff replying to the answer of the defendant, says that the allegations of his bill are true, and the allegations of the answer are untrue, and this he will aver and prove as this court may direct.

GRANT, *for Pl'ff.*

And afterwards, on the 4th day of November, 1865, the following additional and amendatory answer was filed, to wit:

24 And afterward, on the 23d day of October, 1865, it being then of the October term of the said circuit court, the following entry of record was made in the same cause, viz:

Leave to amend.

On motion of the defendants, it is ordered that they have leave to amend their answer by the rule-day of November next, and the cause is continued.

And afterward, on the said rule-day, to wit: on the 6th day of November, 1865, the following additional and amendatory answer was filed, viz:

Answer amendatory.

In the circuit court of the United States for the district of Iowa.

SELDEN S. WALKLEY
vs.
THE CITY OF MUSCATINE and THE MAYOR AND Aldermen thereof.

The answer, additional and amendatory to, but not as a substitute for the answer heretofore in this court by the said mayor and aldermen made and filed.

1st. These defendants, the said mayor and aldermen, further answering, say that they deny the allegation in complainant's said bill, to wit, that they have been requested to levy a tax to pay said judg-

25 ment of complainant, and that they neglected and refused to do so; and they say that at and before the rendition of the said judgment, to wit, on and before the 20th day of October,

A. D. 1864, the date of the said judgment, the then mayor and aldermen of said city had levied the tax on the general taxable property in said city, to the maximum rate permitted by its charter aforesaid, to wit, one per centum on the value thereof; that said levy was made August 20th, A. D. 1864, and that, as already stated in paragraph third of the original answer hereto, the present mayor and aldermen of said city, on the 5th day of August, A. D. 1865, levied for the year 1865, on the general taxable property in said city, the sum or rate of one per centum on the value thereof; that such tax was levied before service was made on, or knowledge was had by, these defendants of the present proceeding of complainant, or of the relief by him in his said bill sought; that if any request was at all made, it was only and solely one implied from the institution by plaintiff of the suit resulting in his judgment aforesaid; and they say that such implied request, if it can be considered a request, is wholly insufficient to make it obligatory on them to provide for the payment of said judgment by the levy and collection of a special tax therefor, even if they had power to make such special levy and collection under the charter aforesaid, which they are advised they have not.

2d. These defendants, further answering, say that the original act of incorporation of said city, approved Feb. 1, 1851, 26 prohibited said city from levying and collecting a tax exceeding the one half of one per centum on the property in said city subject to taxation for general, State, and county purposes; that the amount of revenue obtained from this rate of taxation being found greatly inadequate for the corporate purposes of said city, that said charter was, by the general assembly aforesaid, amended by an act entitled "An act to amend the charter of the city of Muscatine," approved Jan'y 22d, A. D. 1852, and the city council thereof authorized and empowered to levy a tax not exceeding one per centum, which limitation or restriction still continues.

3d. These defendants, further answering, say that by the code of Iowa, which took effect July 1st, A. D., 1851, it is provided in section 1,895 thereof, and numbered 3,274 in the revision of the laws of the said State, which took effect Sept. 1st, 1860, that "public buildings owned by the State or any county, city, school district, or other civil corporation, and any other property which is necessary and proper for carrying out the general purposes for which any such corporation is organized, are exempt from execution."

And they say that the revenue of the city is the public property of the city necessary and proper for carrying out the general purposes for which it was incorporated, and that as the same cannot be taken and appropriated under the general process of law for the satisfaction of complainant's said judgment, they are advised that it 27 cannot, under the mandatory order of this court, be sequestered and appropriated to the payment of the judgment aforesaid, when such sequestration and appropriation would, as they have shown in their original answer hereto, be to the neglect and manifest injury of the general purposes for which said city was incorporated.

4th. These defendants, further answering, say that they have re-

ferred to the original act of incorporation of said city, and the amendments thereto in general terms, and they file herewith as exhibits and part thereof, the said act of incorporation and the several amendments thereto, to wit: the amendment aforesaid authorizing an increase in the rate of taxation, approved Jan'y 22d, 1852, Exhibits A and B; the amendment thereto empowering the said city council, whenever they deem it expedient, to alter the width, course, or grade of any of the streets or alleys of said city, and requiring the said council to make compensation to all persons whose property would be injured by such alteration, approved Jan'y 24th, 1855, Exhibit C; and the amendment enlarging the boundaries of the city, and empowering the council to extend the streets and alleys of the old city limits through the grounds added to the city by the said amendment, approved July 14, 1856, Exhibit D; and, further answering, they say that the said council has not as yet secured the extension of any street or alley through the territory so added, although public convenience demands that several of the streets
28 of said city should be so extended, and the necessity of extending at least one of the streets is now and has for some time past been under consideration before the council. And they further say that both said last named amendments are, in their effects, additional charges on the revenue of the city without any immediate or corresponding return therefor.

Wherefore these defendants say that, for the reasons herein, as well as those heretofore given in the answer to which this is additional, the said bill of complainant ought to be dismissed.

W. F. BRANNAN.
D. O. FINCH, *Sol'rs for Def'ts.*

Affidavit.

STATE OF IOWA, *Muscatine county, ss:*

I, Benjamin Hershey, mayor of the said city, do solemnly swear that I have heard the foregoing answer read and know the contents thereof, and that the matters and things therein stated are true, as I verily believe.

B. HERSHEY.

Subscribed and sworn to before me, a notary public in and for said county, this 2d day of November, 1865.

In testimony whereof, I have hereto set my hand and notarial seal.

[SEAL.] L. H. WASHBURN,
Notary Public, Muscatine Co., Iowa.

29 *Charter.—Exhibit A.*

An act to incorporate the city of Muscatine.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa,* That the town of Muscatine, (formerly the town of Bloomington,) in the county of Muscatine, is hereby created a city by the name of the "city of Muscatine."

SECTION 2. The said city is made a body corporate, and is invested with all the powers and attributes of a municipal corporation.

SEC. 3. All the rights, powers, privileges, duties, liabilities, and property of the late town of Muscatine, are hereby transferred to and imposed upon the said city, except as repealed or qualified herein, and the same may be enforced by or against the city as they might have been by or against the town.

SEC. 4. The said city is hereby divided into three wards, as follows: That part of the city which lies south and west of the
30 middle of Chestnut street, is the first ward; that part lying between the middle of Chestnut street and the middle of Walnut street, is the second ward; that part lying north and east of the middle of Walnut street, is the third ward; but the city council may create new wards, and change the limits of those now or hereafter established.

SEC. 5. Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the city six months, and of the ward in which he offers to vote ten days next preceding a city election, is declared a citizen of the said city, and is entitled to vote at all elections thereof.

SEC. 6. A person offering to vote may be challenged, as in the elections in the townships, and an oath may be administered to him under like circumstances, naming the qualifications herein prescribed.

SEC. 7. No person shall be eligible to any elective office mentioned in this act, unless he be a citizen of the city as above defined, and have been a resident thereof one year next preceding his election.

SEC. 8. The officers of the city shall be a mayor, two alder-
31 men from each ward, a marshal, recorder, treasurer, assessor, and wharf-master, for the choice of whom an election shall be holden annually on the first Monday of March, and each of whom will hold his office for the term of one year, (except in the case of alderman as hereafter provided,) and until their successors are elected and qualified.

SEC. 9. Two aldermen shall be elected in each ward, and such one of the two as receives at the first election the highest number of votes, shall hold his office for the term of two years, and the other one year, and thereafter one shall be elected each year in each ward, to hold for the term of two years. If there be a tie in the above case, the matter is to be determined by lot.

SEC. 10. It is the duty of the mayor to see that the laws and ordinances of the city are executed, and their violations punished, to superintend and direct the official conduct of the subordinate officers, to keep the seal of the city, and to sign and seal all commissions, licenses and permits granted by the city council, and perform such duties and exercise such powers as pertain to the office of mayor of a city, and such as may be granted by the ordinances of the city consistent with law.

32 SEC. 11. He is, by virtue of his office, a justice of the peace, and is invested with exclusive original jurisdiction of cases

arising under the ordinances of the city, with criminal jurisdiction of the offences against the laws of the State committed within the city, and with civil jurisdiction limited to the city in the same manner as that of justices is, or may be, limited to their townships; and he will not be disqualified to act in such judicial capacity by any proceeding being in the name of, or in behalf of, the city. He will be entitled to demand and receive in civil actions, and in actions for the breach of the laws of the State, such fees as are at the time allowed by the law to a justice of the peace.

SEC. 12. Appeals to the district court in the same county shall be allowed [from] the judgment and decisions of the mayor in the same cases, time, and manner as they are at the time allowed by law from those of other justices, and they shall be tried in the same manner.

SEC. 13. He shall be the presiding officer of the city council, when present, and shall give the casting vote when there is a tie. In his absence the council may appoint a president for the time being.

SEC. 14. The recorder is required to keep a true record of all the proceedings of the council, and such record shall at all times
33 be open to the inspection of any citizen, and he shall perform such other duties as may be required by the council.

SEC. 15. The marshal is made a conservator of the peace; he is the executive officer of the mayor's court, and shall execute and return all process directed to him by the mayor, and in cases for the violation of the criminal laws of the State, and of the ordinances of the city, may execute such process in any part of the county; he is invested with the same authority within the city to quell riot and disturbances, to prevent crimes, and to arrest offenders, that the sheriff has within his county. He shall perform such other duties as the council prescribe, and, with its approval, may appoint one or more deputies, for whose official acts he will be responsible, and whom he may discharge; for the services of legal process he will be entitled to the same fees as a constable, and for services required by the council such compensation as it may allow.

SEC. 16. The legislative authority of the city is vested in a city council, consisting of the mayor and a board aldermen, composed of two from each ward of the city.

SEC. 17. The council may hold meetings as it sees fit, having stated times fixed, or having provided by ordinances for the manner
34 of calling them. Its meetings shall be public.

SEC. 18. A majority of the council will be necessary to constitute a quorum. It is the judge of the election and qualification of its own members; it may determine the rules of its own proceedings; it may compel the attendance of its members at its meetings, in such manner and by such penalties as it may adopt; and it shall cause a record of its proceedings to be kept.

SEC. 19. The council is invested with the following powers:

1st. To make ordinances to secure the inhabitants against fire, against violations of the law, and the public peace; to suppress riots, drunkenness, gambling, and indecent and disorderly conduct; and generally to provide for the safety, good order, and prosperity of the city, and the health, morals, and conveniences of the inhabitants.

2d. To impose penalties for the violation of its ordinances, not exceeding one hundred dollars, which may be recovered by civil action in the name of the city, or by complaint before the mayor, as in the case of a complaint before a justice of the peace, and the laws of the State in relation to carrying into effect a judgment of a justice of the peace under a complaint shall be applied to judgments in the above cases, but the charges thereof must be borne by the city.

35 3d. To establish and organize fire companies, and provide them with engines and other fire apparatus.

4th. To regulate the keeping and the sale of gunpowder within the city, and to provide that no building of wood shall be erected within such parts of the city as may be designated, and to declare such buildings a nuisance, and cause their removal.

5th. To have the control of the landing on the Mississippi river, and build wharves and regulate the landing, wharfage, and dockage of boats, and all water crafts, goods, lumber, and other things landed at, or taken [away] from the same: Provided, nothing in this section shall be [so] construed as to affect the rights of the State or counties, nor to prevent the county of Muscatine from granting ferry charters in said county.

6th. To exercise exclusively the power to provide for the license, regulation, or prohibition of exhibitions, shows, and theatrical performances, billiard tables, ball and ten-pin alleys, and places where any games of skill or chance are played. But this power extends to no exhibition of a properly literary, scientific, or artistical character; and when the laws of the State permit license for the sale of intoxicating liquors, that subject shall be within the exclusive authority of the council, and it may at all times prohibit the retail of the

36 above liquors, unless such prohibition would be inconsistent with the law of the State at the time existing; and it may revoke or suspend any of the licenses above mentioned when it considers that the good order and welfare of the city require it.

7th. To make all requisite ordinances in relation to the cleanliness and health of the city, and to require the owners of lots, on which water becomes stagnant, to drain or fill up the same, and in default thereof, after a reasonable notice, to cause the same to be done at the expense of the city, and assess the cost on the specific lots, and cause them to be sold by the city collector, as in the case of unpaid taxes; but the owner may redeem the same as in that case.

8th. To regulate cartage and drayage within the city, and may license therefor, and may also make a prohibition of animals running at large within the city.

9th. To provide for the establishment and support of schools in the city when there has been a legal vote of the citizens in favor thereof, and to provide for the government thereof.

10th. To audit all claims against the city; to provide for the keeping of the public money of the city, and the manner of drawing the same from the treasury; and all officers of the city are accountable to the council in such manner as it directs; and it is the duty of the council to publish annually a particular statement of the

receipts and expenditures of the city, and of all debts owing to or from the same.

11th. To establish the grade of the streets, alleys, and wharves, and to change that of wharves at pleasure, and that of a street or alley upon a petition of two-thirds the value of the real property on both sides the street where the change is desired.

12th. To prescribe the manner of calling the meetings of the citizens, except for the election of officers.

13th. To appoint in such manner as it determines, and during pleasure, one or more street commissioners, a clerk of the market, city surveyor, health officers, and such other officers as it deems advisable, and may prescribe their duties, powers, and qualifications, and may provide for the election of any of those officers by the citizens.

14th. To cause the streets and alleys of the city to be paved, and the pavements to be repaired, and to that end it may require the owners of the lots adjacent to which it is to be done to pave or repave one-half in width of the street contiguous to their respective lots; and in case of neglect, after a reasonable time named in the order, the same may be done by the city, and the expense may be assessed on such lots, which shall have the effect of a tax paid thereon, and they may be sold therefor as for a tax, subject to the same right of redemption.

15th. To borrow money for any object in its discretion, if at a regularly-notified meeting, under a notice stating distinctly the nature and object of the loan, and the amount thereof, as nearly as practicable, the citizens determine in favor of the loan by a majority of two-thirds of the votes given at the election.

16th. To fill vacancies occurring in any of the city offices by appointment of record to hold, in the case of elective offices, until the next regular election and the qualification of the successor.

SEC. 20. Ordinances passed by the city council shall be signed by the mayor and attested by the recorder, and before they take effect be published in one or more newspapers printed in the city at least ten days, or be posted in each ward for fifteen days; they shall be recorded in a book to be kept for that purpose, and signed by the mayor and attested by the recorder.

SEC. 21. The elections of the officers shall be conducted in a manner as similar to that in which the elections are conducted in the townships as the nature of the case permits.

SEC. 22. A person offering to vote may be challenged as in the elections in the townships, and an oath may be administered to him under like circumstances naming the qualifications herein prescribed.

SEC. 23. No person shall be eligible to any elective office mentioned in this act unless he be a voter of the city, and have been a resident thereof one year next preceding his election.

SEC. 24. No member of the city council shall be eligible to any office in the gift of the council during the term for which he is elected, nor shall he be interested, directly or indirectly, in the

profits of any contract, or job of work, or service to be performed for the city.

SEC. 25. For all elections for city officers the mayor is directed to issue a proclamation to the voters of the city, or of the several wards, as the case may be, naming the time and place or places of the election, and the officers to be chosen, and cause a copy to be posted up in each ward at least ten days before the election, or instead thereof he may cause a copy to be published in a newspaper printed in the city the same length of time.

SEC. 26. The polls shall be opened between the hours of eight and ten o'clock in the forenoon, and continue open until four o'clock in the afternoon. Within two days after the election the judges of the election shall make their returns to the city council, who shall
40 examine them, and cause an abstract of the vote to be recorded in a book to be kept for that purpose.

SEC. 27. The mayor, aldermen, marshal, treasurer, recorder, and assessor shall take an oath to support the Constitution of the United States and of the State of Iowa, and faithfully and impartially to perform their duty to the best of their knowledge and ability; the oath of office may be administered by the mayor or recorder when he is qualified, and in the transaction of the business of the corporation those officers and the president for the time being may administer oaths, which shall be of the same effect as if administered by other officers authorized thereto.

SEC. 28. Such of the officers as the council determines shall give bond in such penal sum, and with such condition as may be prescribed, and to be approved as required.

SEC. 29. The duties of all the officers (in addition to the duties herein prescribed) shall be such as are provided by ordinances, and they will be entitled to such compensation for their services and subject to such penalties and forfeitures for violation of duty (except as herein provided) as the ordinances may prescribe.

SEC. 30. The city council is further authorized to levy and
41 collect taxes not exceeding one-half of one per cent. on the value of all property within the city which is liable for State and county taxes, including improvements on real property. The council may also levy a tax on dogs, or may prohibit their being kept in the city.

SEC. 31. The latest county assessment roll shall form the basis of the assessment, but the city assessor may add thereto any property omitted, assessing the same himself.

SEC. 32. The marshal (or such person as, in case of his absence or disability, the council may appoint of record) shall be the collector of taxes, and before proceeding to collect the same shall give thirty days' notice of the assessment and levy of the tax, and the rate thereof, in general terms, without names or the description of property, in a newspaper printed in the city, if there be one, and if none, then by two written notices posted in public places in each ward.

SEC. 33. During the thirty days any person aggrieved by his assessment or taxation may appear before the council, which may correct the same if found erroneous. (Printed enormous.)

SEC. 34. The mayor shall affix his warrant to the tax list, in general terms requiring the collector to collect the taxes therein
42 according to law, and such warrant and list shall be a justification to the collector.

SEC. 35. When any person's tax is not paid within a reasonable time after demand, the collector may distrain upon personal property liable to taxation, and sell the same as the county collector may sell in like cases.

SEC. 36. Taxes on real property shall be a lien thereon, and it may be sold therefor (if no personal property be found) when the taxes remain unpaid for four months after the publication of the notice of the tax; but demand of the tax must be made a reasonable time before sales if the supposed [owner] be found in the city.

SEC. 37. Such sales must be at public auction, and there must be thirty days' notice prior thereto given, as above provided for, notifying the assessment and tax, and in such sale he who bids to pay the amount due for the least quantity of the land will be the highest bidder, and the manner of ascertaining the portion purchased shall be as directed in the State revenue law now or hereafter existing.

SEC. 38. The collector shall execute and deliver to the purchaser a deed running in the name of the State, which shall have the same force and effect as the deed of the treasurer of the county on
43 sales for county and State taxes under the law existing at the time. The land may be redeemed within one year from the day of the sale by the payment of the purchase money and ten per cent. thereon, with any other taxes paid by the purchaser, which payment may be made to the purchaser, his agent, or the treasurer of the city.

SEC. 39. On the passage of this act the president and trustees of the town of Muscatine are required to cause a vote to be taken on the acceptance of this charter, in the manner in which the elections of the town are now called and holden, in which the vote shall be "for the charter," or "against the charter," and shall be taken by ballot; and if the vote be in favor of its acceptance, such result shall be declared, and be entered on the record of the present town, and thenceforth the same is accepted.

SEC. 40. The existing authorities of the town of Muscatine will continue until an election is holden for the choice of city officers, and the organization of the city, and the town authorities shall cause an election to be holden on the first Monday of March, 1851, for the election of city officers; but if this act does not take effect at a day sufficiently early for the above proceedings to take place as early as the day above named, then the question above provided for
44 may be taken after the said first Monday of March, but the officers then chosen will hold as if elected on the above-named day, and the succeeding annual election shall be holden as in this act before provided.

SEC. 41. This act shall be taken and shall be pleaded as a public act.

SEC. 42. An act entitled "An act to incorporate the town of

Bloomington," approved Jan'y 23, 1839; an act entitled "An act to amend an act entitled an act for the incorporation of the town of Bloomington," approved Feb'y 18th, 1842; and an act entitled "An act to amend an act entitled [an act] to incorporate the town of Bloomington, approved Jan'y 2d, 1836," approved Jan'y 14th, 1846; and an act entitled "An act to amend an act entitled an act for the incorporation of the town of Bloomington, approved Jan'y 23d, 1839," approved Jan'y 12th, 1849, are hereby repealed, but the rights and privileges, duties, liabilities and obligations of individuals created or arising under the acts so repealed, are not to be affected by this repeal.

SEC. 43. This act shall take effect from and after the passage thereof.

Approved Feb. 1, 1851.

45 *Amendment to charter.—Exhibit B.*

An act to amend the charter of the city of Muscatine, approved Feb. 1, 1851.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa,* That in case of the absence of the mayor of the city of Muscatine from the city, and in case of his inability to act as a justice, any justice of the peace in the township of Bloomington may take cognizance of cases arising under the ordinances of the city; such absence or inability being made to appear upon the docket of the justice; and in like cases of the absence or inability of the mayor, the president of the council *pro tempore* shall have authority to sign ordinances and orders on the treasurer, and to administer oaths, and to do all other things pertaining to the office of mayor, (except acting as a justice of the peace,) stating, in connexion with his signature, the absence or inability of the mayor.

SEC. 2. The council of the said city shall have authority to appoint the marshal and recorder of the city, which officers shall hold their respective offices during the pleasure of the council, and from whom, or any of them, the council may, by general ordinance, require bond.

46 SEC. 3. The said council shall appoint an assessor for the city, who shall be sworn to perform the duties of office faithfully and impartially, and whose duty it shall be to make an assessment of the property in the city subject to taxation, and upon whose assessment the council may levy a tax not exceeding one per cent. upon the value in any one year.

SEC. 4. An affidavit made by the recorder, marshal, or mayor, or by the printer or publisher of a newspaper in which an ordinance may be published, stating the time and manner of the publication of an ordinance, and sworn to before the mayor or any justice of the peace in the county of Muscatine, and filed in the recorder's office, or made and signed on the face of the record of ordinances, shall be prima facie evidence of the publication therein stated.

SEC. 5. The said city of Muscatine shall hereafter form one road

district, and the road tax assessed by the county authorities upon the persons and property in said city, may be collected by the street commissioner or such other officer as is or may be created or appointed by the council to conduct the improvements upon the streets of the city; and such officer is empowered to collect such tax as fully and in the same manner as the road tax is collected in the
47 county generally, and the said tax shall be expended by the proper officer, under the supervision and direction of the council, upon the streets and alleys of the city.

SEC. 6. All parts of the act and charter of which this is an amendment, and of any other acts conflicting with this act, are hereby repealed.

SEC. 7. This act shall be taken and may be pleaded as a public act.

SEC. 8. This act shall be submitted to the voters of the city of Muscatine, for acceptance or rejection, on the first Monday of March next, in which election the vote shall be taken by ballot, and by the word "amendments," or "no amendments," written upon the ballots. If accepted, the result of the election shall be entered in the records of the city, and this act shall take effect from the said first Monday of March, and the votes cast for recorder and marshal shall be held for naught, and the council shall thereafter appoint those officers.

SEC. 9. This act to take effect from and after its publication in the Democratic Inquirer and Muscatine Journal, provided, the State shall not incur any expense for publication.

Approved Jan'y 22d, 1852.

47a *Amendment.—Exhibit C.*

An act amendatory to the act incorporating the city of Muscatine.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa,* That the city council of the city of Muscatine shall have power, whenever they deem it expedient for the public interest of said city, to alter the width, course, or grade of any of the streets or alleys of said city.

SECTION 2. That if any property owner of said city shall be injured by any such alteration, such person may make application to the board of commissioners, appointed as hereinafter provided, for the assessment of damages, who, upon such application, shall give ten days' notice in the newspapers published in said city, in case the claimant be a resident of said city, or twenty days' in case the claimant be a non-resident, stating the time and place of meeting and object of the same; and at the time specified in said notice said commissioners shall proceed to view and assess the damage done by reason of such alteration, taking into consideration the advantages and disadvantages of such alteration and improvement, and shall,
48 within five days thereafter, make an award and return the same to the county judge of Muscatine county, who shall enter judgment thereon, if approved, and said judgment shall be final.

SECTION 3. The said council or person interested may, whenever they deem it necessary, make application to the county judge of said

county, who shall appoint three disinterested property holders, resident in the city, who are hereby constituted a board of commissioners for the assessment of damages; which board, or any member thereof, may, for good causes, be removed, and the vacancy occasioned thereby filled by said judge.

SECTION 4. That in any case when, by reason of such alteration, any claim for damages may arise, and the thereof shall neglect to apply to said commissioners, the city council may make such application, and the proceedings thereon shall in all respects be the same as specified in the second section of this act.

SECTION 5. This act shall take effect and be in force from and after its publication in the Muscatine Journal and Democratic Inquirer, the expense of which shall be paid by said city.

Approved Jan'y 24, 1855.

Amendment.—Exhibit D.

An act to amend the act to incorporate the city of Muscatine.

SECTION 1. *Be it enacted by the general assembly of the city of Muscatine*, That from and after the passage of this act, the following shall be the boundaries of the city of Muscatine: Commencing at a point in the centre of the main channel of the Mississippi river, where the south line of section ten, township seventy-six north, of range two west of 5th p. m. should strike; thence running west and along said section line to the west line of said section ten; thence north and along the section lines of sections ten, three, thirty-four, and twenty-seven, to the northwest corner of the southwest quarter of section twenty-seven, township seventy-seven north, of range two west of the 5th p. m.; thence east through the centres of sections twenty-seven, twenty-six, and twenty-five, to a point where said line strikes the township line between ranges one and two west; thence south and along said township line to a point in the centre of the main channel of the Mississippi river, and thence along the centre of said channel to the place of beginning.

SECTION 2. The said city of Muscatine, as above bounded, may hereafter form two road districts; the boundaries of which shall be determined by the city council, and until so determined it shall constitute one road district, and the road taxes assessed by the county authorities on the persons and property in said city shall hereafter be payable only to such persons as the council may authorize to receive the same, and the county collector is hereby prohibited from paying said road taxes to any other person or officer than such as shall be authorized to receive and receipt for the same by the city council.

SECTION 3. That it shall be competent for the council of said city to take any step which they may deem necessary to secure the extension of the present streets and alleys of the old city limits through the grounds which by this act are added thereto: *Provided*, That in no case shall such extension be made and dedicated to the use of the public without the city being liable for full compensation to the owners of all such property as may be thus taken and dedicated.

SECTION 4. That it shall be lawful for the city council of the city to make any changes in the shape and width of any streets or alleys of said city, either in the old or new limits, to shut up old and make new streets and alleys: *Provided*, That in all and every such
51 case the said city shall be liable to make full compensation at the fair cost value to the owners of all property which shall thus be taken for the public use, and for all damages which the owners may sustain by any changes which said city council may at any time see proper to make.

SECTION 5. That all lands lying within the territory brought into the city, and not laid out into lots or out-lots, shall not be assessed or taxed otherwise than by the acre, according to its value for agricultural, horticultural, mining, or other purposes, but improvements thereon may be taxed at their full value.

SECTION 6. The city council shall have full power to establish grades for contemplated streets and alleys in the new limits, and may make such grades conform to the of the old city or not, as they may deem advisable; and said city shall not be liable for any damages done to buildings by grading in the new limits, unless such buildings shall have been erected before the establishment of the grades in this section contemplated.

SECTION 7. This act shall take effect from and after its ac-
52 ceptance by the city council of Muscantine, and its publication in the Muscantine Journal and Iowa Democratic Inquirer, the expense of said publication to be paid by the city of Muscatine.

Approved July 14, 1856.

Endorsed: Filed Nov. 6, 1865.

W. G. WOODWARD, *Clerk C. C. U. S.*

53 And afterward, on the 17th day of November, 1865, the following replication to the additional and amendatory answer was filed, viz:

Replication to 2d answer.

SELDEN S. WALKLEY
v.
CITY OF MUSCATINE. } In equity.

[redacted] plaintiffs, replying to the additional and amendatory answer of the defendant, says that the allegations of his bill are true, and the allegations of the said answer are untrue, and this he will aver, and prove as this court may direct.

GRANT, *for Pl'ff.*

54 Proceedings before the circuit court of the United States in the district of Iowa, at a term thereof begun and holden at Des Moines on the third Tuesday of October, A. D. 1864.

Be it remembered that on the 20th day of October, 1864, it then being of the October term of the said court in the year 1864, the following proceedings, among others, were had, viz:

Judgment at law.

SELDEN S. WALKLEY
v.
THE CITY OF MUSCATINE. } No. 240.

This cause now coming on for hearing, the plaintiff appears by James Grant, esq., his attorney, and the defendant, though three times called, comes not, but makes default, and it being shown to the court that the action is brought upon written promises to pay money, it is ordered that the clerk assess the amount due from the defendant to the plaintiff.

And afterward the clerk reported that there was due from the defendant to the plaintiff the sum of seven thousand and six hundred and sixty-six dollars and twenty-one cents, ($7,666 21,) and upon motion the said report was confirmed.

Whereupon it is considered by the court that the plaintiff,
55 Selden S. Walkley, have and recover of the defendant, the city of Muscatine, the sum of seven thousand and six hundred and sixty-six dollars and twenty-one cents, ($7,666 21,) his damages, together with the costs of this suit, taxed at $51 00, and that he have execution for the above sums, and that this judgment draw interest at the rate of six per centum until paid.

I, W. G. Woodward, clerk of the circuit court of the United States in the district of Iowa, hereby certify that the foregoing is a full and true transcript of the judgment and entry of record in the cause above named and in the said circuit court, as the same now remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court, at Des Moines, this 25th day of June, A. D. 1866.

[SEAL.] W. G. WOODWARD, *Clerk.*

Upon which judgment was afterward issued an execution in words and figures as follows, viz:

56 *Execution.*

UNITED STATES OF AMERICA, *District of Iowa, ss:*

To the marshal of said district, greeting:

In the name of the President of the United States we command you, that of the goods and chattels of the city of Muscatine, State of Iowa, found in your district, you cause to be made the sum of seven thousand and six hundred and sixty-six dollars and twenty-one cents ($7,666,21) debt, and fifty-one dollars cost, which Selden S. Walkley hath lately in our circuit court of the United States for the district of Iowa, by the consideration and judgment of said court, recovered against the said city of Muscatine, for his damage and costs in a certain action before that time prosecuted by the said Walkley against the said city, as appears of record, together with six per cent. interest on the same from the 20th day of October, in the year eighteen hundred and sixty-four, until collected, together with $1 75 for cost of increase on said judgment; and for want of sufficient goods and chattels,

we command you to cause the same to made of the lands, tenements, and hereditaments of the said city of Muscatine; and have you that money before our said circuit court on the second Tuesday of May next, at Des Moines, Iowa, to render to the said plaintiff; and have you then and there this writ, with your doings thereon.

Witness the Hon. S. P. Chase, Chief Justice of the Supreme Court of the United States, at Des Moines, this, the 19th day of April, A. D. 1865, and of the independence of the United States the 90th year.

[SEAL.] W. G. WOODWARD, *Clerk.*

57 Upon which execution are the following endorsements, viz:

Return to ex'n.

This execution is returned, "no property found."

PETER MELUDY, *U. S. Marshal.*
By A BOWERS, *Deputy.*

Returned and filed May 10th, 1865.

W. G. WOODWARD, *Clerk.*

58 And afterward, on the 15th day of May, A. D. 1866, it then being of the May term of the said circuit court, the following decree was rendered and entered of record, that is to say:

Final decree.

SELDEN S. WALKLEY
vs.
THE CITY OF MUSCATINE and THE MAYOR AND Aldermen thereof. } No. 55, Eq.—Creditor's Bill.

This cause now came on to be heard upon the bill and exhibits, answer, and amended answer and exhibits, and replications to the answer and amended answer; Grant appearing for the plaintiff, and Brannan for the defendants:

And upon argument heard the court doth order and adjudge that the said bill be dismissed with costs against the plaintiff, taxed at $, and that execution issue therefor.

And thereupon the plaintiff prayed an appeal to the Supreme Court of the United States, which is allowed upon the plaintiff filing his bond in the penal sum of one hundred dollars, with Charles Whitaker as surety, conditioned as required by law, which is done, and the appeal is allowed during the term.

59 And on the same 15th day of May, 1866, it still being of the same May term, the aforesaid bond was filed in the words and figures following, viz:

Bond.

Know all men by these presents, that we, Selden S. Walkley, as principal, and Charles Whitaker, as surety, are held and firmly bound unto the city of Muscatine and the mayor and aldermen thereof, in the penal sum of one hundred dollars, to which payment we bind ourselves and each of us by these presents.

The condition of this obligation is this: Whereas Selden S. Walkley has appealed from the decision of the circuit court of the United States for the district of Iowa, in a certain cause in equity therein pending, wherein Selden S. Walkley is plaintiff, and the city of Muscatine and the mayor and aldermen thereof, defendants, which decision dismissed the plaintiff's bill, and said Walkley has prayed an appeal to the Supreme Court of the United States, which has been allowed him. Now, if said Walkley shall prosecute his appeal with effect, and answer all damages and costs if he fail to make
60 good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SELDEN S. WALKLEY,
CHARLES WHITAKER, *Surety.*

Which bond is indorsed as follows: Approved and filed this 15th May, 1866.

W. G. WOODWARD, *Clerk.*

61 UNITED STATES OF AMERICA, *District of Iowa:*

I, W. G. Woodward, clerk of the circuit court of the United States for the district of Iowa, hereby certify that the foregoing pages of writing contain and constitute a full, true, and perfect transcript of the records, proceedings, and papers of the above entitled cause in the said circuit court, as fully as they remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court, at Des Moines, this 25th day of June, A. D. 1866.

[SEAL.] W. G. WOODWARD, *Clerk.*

[Rev. stamp.]

Clerk's fees:

Transcript	$22 50
2 certif's and seals	70
	23 20

Paid by plt'ffs at'ys.

Supreme Court of the United States.

SELDEN S. WALKLEY,
Appellant.

vs.

THE MAYOR AND ALDERMEN of the City of Muscatine, and the City of Muscatine
Appellees.

In Equity.

APPEAL FROM THE CIRCUIT COURT of the DISTRICT OF IOWA.

CASE.

A bill in equity was filed by the plaintiff on the 22d July, 1865, in the court below, a judgment creditor and execution returned nullabona, against the defendants as insolvent to reach taxes, which could not be collected on execution.

The plaintiff alleged, that on the 13th of August, 1855, the Mayor and Aldermen of the city of Muscatine, in pursuance of authority vested in them by their charter, submitted to the qualified voters of said city a proposition to authorize the city council to borrow $130,000, and issue bonds therefor at 10 per cent. interest, to be subscribed to the stock of the Mississippi and Missouri Railroad Company; that upon

such election, a majority voted in favor of the proposition, and the City Council issued said bonds, payable in twenty years, bearing ten per cent. interest: and said bonds were sold and delivered to various parties: that the plaintiff being the owner of divers of said bonds and the interest thereon not being paid, brought a suit at law in the court below for the recovery of unpaid interest and such proceedings were had, that on the 20th of October 1864, he recovered judgment for the sum of $7,666.00 with 6 per cent. interest and costs taxed at $51; that execution has issued thereon and been returned nullabona as by the records of said court will fully appear; that the city of Muscatine has no property which is liable to execution at law, and the Mayor and Aldermen have been requested to levy a tax to pay the same and have refused so to do.

That the city of Muscatine and the Mayor and Aldermen thereof have authority by their charter to levy a tax of one per cent. on the valuation of the property of said city and such a tax has been and usually is levied by the Mayor and Aldermen every year: that said tax constitutes the chief source of revenue for said city and yearly amounts to a sufficient sum to pay said judgment; that the defendants since the interest due on said bonds was recovered in said judgment, have appropriated their revenues to other purposes, and have totally neglected to pay the interest before judgment or the judgment; that the corporation of Muscatine is insolvent and unable to pay its debts from any other source, than from revenues, derived from taxation.

The plaintiff having no other adequate remedy, prays, that the defendants may be decreed to levy a tax of one per cent. for 1865, on the taxable property of the corporation and to appropriate so much as may be required to pay said judgment, interest and costs; that the Mayor and Aldermen may be restrained from appropriating their revenue to any other

purpose than the payment of the judgment and for such other relief as the case may require. The subpoena was served on the 28th of August, 1865.

ANSWER OF DEFENDANTS.

On the 3d of October, 1865, the defendants answered, admitting the vote to borrow the money and issue the bonds saying that the submission was without warrant of law and for objects entirely foreign to the purposes of the corporation; they admit the recovery of the judgment by plaintiff, issue of execution and return of no property; admit the insolvency of the corporation and that they have no other revenue, than the power to levy a tax of one per cent. on the taxable value of the property in the city.

They set up affirmatively that on the 5th of August, 1865, a levy of such one per cent. was made on a valuation of $1,890,175, and the total tax, if all is collected, is $18,-901.75. That, of this tax, five mills or one half has been appropriated and set apart especially for work and labor on the streets of the city, and the revenue for other purposes, including the payment of debts and liabilities owing by the city; that the road and street tax has always been a separate, distinct and special charge; that all persons owing road taxes, have, under the general laws of the State, a right to work them out, and more or less is always so paid; that nearly $8,000 has been expended on roads and will have to be paid out of the present tax; that in addition to the tax of one per cent. the city may get $400 from licenses; that the corporation needs all the money for other purposes than the judgment; that the debt of the city, not in bonds, but in orders or something else, is $26,752.39; that it owes for interest on its bonds $104,000, the interest and other sums making a total with the bond debt of about $280,000.00. That the outstanding orders taken by tax payers, under the

expectation that they could pay taxes with them amount to the sum of $9,960.86, which were received for a valuable consideration and ought to be paid; that there is also a judgment against the defendants rendered in the state court, June, 1865, for $7,501.22, on which execution has been issued and returned no property and a bill similar to the plaintiffs bill has been filed in the state court, and if each court should grant the relief sought, it will be more, then the city can pay. The whole acts of incorporation connected with the city government are annexed to the answer; that the city has been improvident and got in debt, beyond its means, and wants all its revenue for other purposes, than the payment of its debts.

A copy of the order levying the tax of 1865 and dividing it out is annexed to the answer and disproves the allegations of the answer. It was levied for general purposes, under the one per cent. power of the charter, and no part of it under the road law.

An amended answer was filed, setting out more in detail the argument of the first of the insolvents desire to use the public taxes without regard to plaintiffs rights, and denying that any demand was made for the levy of the tax.

There was a general replication and the case was tried below upon the bill answer and exhibits; copies of the judgment, execution and return of the plaintiff which were inspected by the court, no profert being needed in the same court are sent up, as part of the case. The court below dismissed the bill.

ARGUMENT.

The allegations of the bill necessary to relief were admitted by the answer, to-wit: judgment, execution, return of no property, insolvency and authority to levy a tax of one per cent. on $1,800,000 which was sufficient to pay the plaintiffs judgment. The defendants denied a demand to

levy a tax, but that was not material to the relief sought, or the allegation would have been proved by the Mayor, who swore to the answer, through a mistake. The defendants produced no evidence of their extraordinary defence.

The case by the papers is this: The plaintiff has recovered judgment, issued execution, and has a return of no property, against the defendant, an insolvent, which has a *fund* sufficient to pay the debt; and this fund cannot be reached by execution. The laws of Iowa do not permit executions against corporations to be levied on the property of public corporations to be used for public purposes; but they do provide, Code of 1860, Sec. 3,275, page 601, that "if no property is found, on which to levy an execution, a tax shall be levied, as early as practicable to pay off the judgment, interest and costs." We cite the section as the Supreme Court interprets it: See Oswald v. Thedinga, and al. 17 Iowa, 13, also 12 Iowa, 335 where it is held, that he creditor is not bound to take the scrip of the corporation. In the same case the Supreme Court holds, that a demand by the creditor is not necessary, and they also hold in the same case, that by Sec. 3,275 of the code, a plaintiff has a resort against the officers of the corporation for his judgment, if they refuse to levy such tax.

The Supreme Court of Iowa has also held, "where a debt of a municipal corporation has been reduced to a judgment, and it can be paid in no other way, it is the duty of the authorities to levy and collect a tax, within the limit of the power to levy taxes, and sufficient to pay the same, and such tax should be set apart and applied only to the purpose for which it was levied.

Coy v. the City of Lyons, 17 Iowa, 1.

This case holds, that a judgment creditor by his diligence has a superior right to all simple contract creditors, and can take all the revenues of the city, for the purpose of paying his judgment.

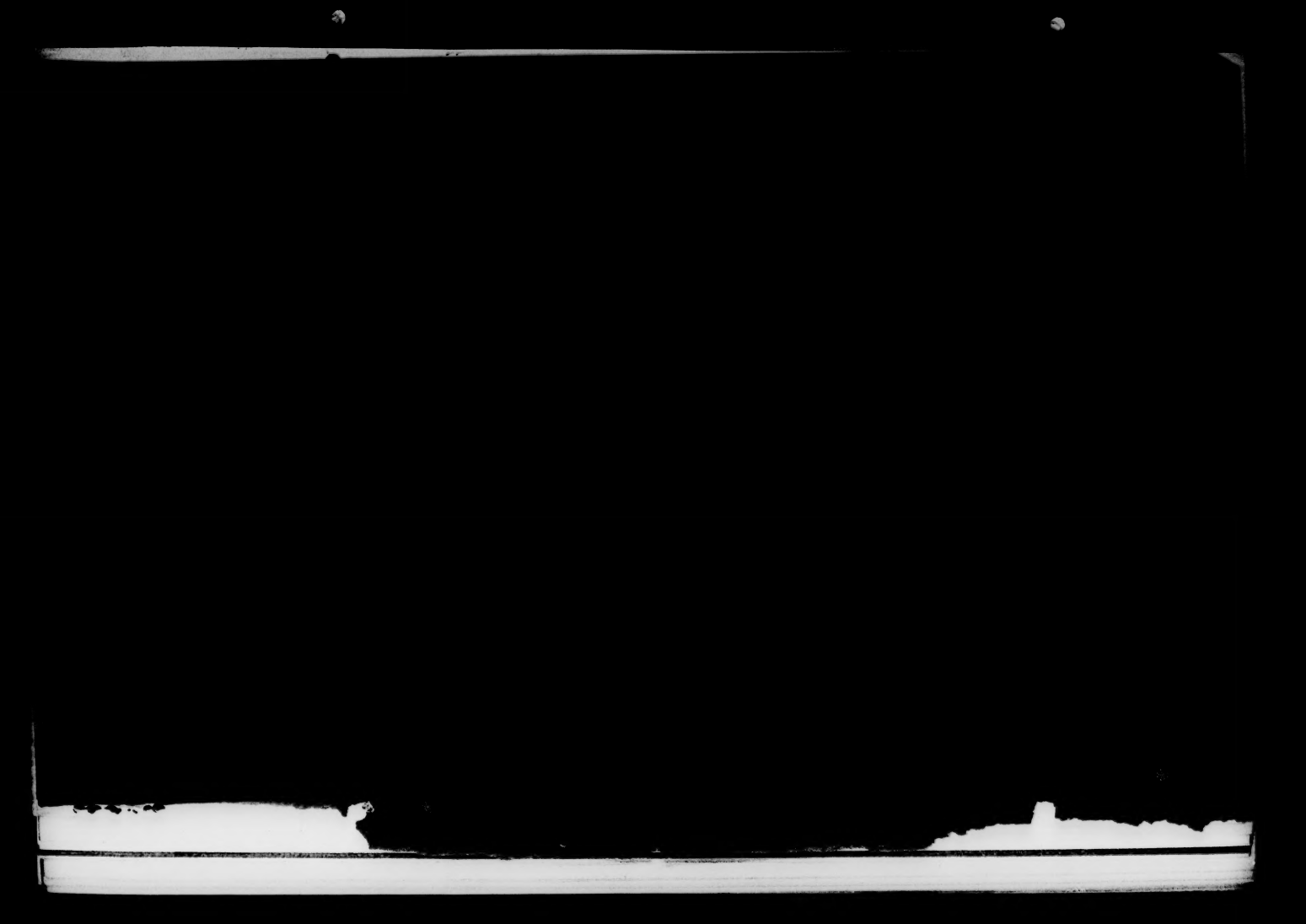
The judge of the Circuit Court of the United States for Kentucky, held the same way, in an opinion, which is not published, but the reading of which is thus: Dennison v. The City of Covington.

"The material facts of this case are these: In 1852, the Legislature of Kentucky, passed an act authorizing the city of Covington to endorse and guarantee the bonds of the Covington and Lexington Railroad Company to the amount of $200,000. The endorsement and guaranty was accordingly made, by the city. The bonds had twenty years to run and bear interest, payable half yearly. They were sold in the stock market of the country. Marcus Dennison of Baltimore, became the holder of fifty of these bonds. The Railroad Company having failed to pay the interest maturing on these bonds, in 1857, '58 and '59, Dennison brought his suit, in the Circuit Court held at Covington for the amount of his interest, recovered judgment on which execution was returned unsatisfied. At the last term he obtained a writ to show cause why a writ of mandamus should not issue requiring the city to pay his judgment out of any money in the Treasury, not otherwise appropriated, before the emanation of the writ and in default of money, then that the council make payment thereof out of the first moneys coming into the treasury. The defendant resists the application on the ground, first, that it had no money in the treasury, out of which to pay Denison's judgment. Secondly, that the ity charter only authorized it to levy and collect a tax of fifty cents on the hundred dollars value of property in the city, and that this was not more than sufficient to meet the current expenses of the city government, and, thirdly, that the legislature did not intend that the interest on these bonds should be paid out of the ordinary revenue, or that, at most the current expenses of the city government must be first paid, before anything could be applied on the interest.

We hold, that as the Legislature had not authorized the levy of a specific tax to meet the interest, they must have intended that it should be paid out of the ordinary revenue of the city arising from such tax, as city authorities were authorized to levy by their charter, that the interest on these bonds was as much chargeable to this fund, as any other debt, not excepting that incurred in the course of the city government: that no lien exists in favor of any creditor of the city in the fund, that it is the duty of the city to pay its debts in the order in which they arise; that those creditors who first resort to the courts to compel payment of their debts must be first paid; that if the present rates of taxation are not sufficient to enable the city to discharge its debts as they accrue, the city must resort to the Legislature for additional powers. Let the writ issue."

As there is no demurer to the bill, and no grounds of demurrer set up in the answer, it is impossible to conceive, that the court below dismissed this bill, because equity could not relieve. He dismissed it, solely because he is "demoralized" on the subject of bond debts, and holds that the corporation is under no obligation to judgment creditors, and may use their revenue, as they please; though the laws of Iowa and its Supreme Court say, the corporation officers must levy a tax to pay the judgment.

This Court in Knox Co. Commissioners v, Aspinwall, 24 Howard, 376, 385, in answer to the argument of the plaintiff in error, that the creditor could only have relief in equity, say. "A court of equity, is sometimes resorted to, as ancillary to a court of law, in obtaining satisfaction of its judgment. It is no objection to the writ of mandamus, that the party might possibly obtain another remedy, by new litigation in a new tribunal." Lyell v. Board of Supervisors, 3 McLean, 580, is in principle like the present. The Court held that a writ of mandamus is a cumulative remedy, and does not oust the Court of equity of its juris-



diction, and that a plaintiff has the same remedies against a county as against an individual.

The case presented by the bill, is that of a judgment creditor, seeking to reach a fund of his debtor not subject to execution. There can be no doubt that, in all cases of individuals in such cases, the plaintiff may have relief in equity. It is equally true in principle, against corporations. The statute of Iowa makes them persons. They are no more exempt from the jurisdiction of equity, than other persons and if the answer in this case, was proved to be true, it would present the case of a debtor insolvent, who had a fund with which he ought to pay his judgment debts, insisting in a court of equity, that as he was insolvent, he had a right to disregard all law and make new debts and pay them, without any regard to those he already owed. The case of Coy v. Lyons, 17 Iowa, is so conclusive in favor of the plaintiff, that upon that alone, we insist that the decree below should be reversed, and we ask for a decree here for the plaintiff, if the practice of the Court allows it.

J. GRANT, for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

SELDON S. WALKLEY,
Appellant,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF MUSCATINE, AND THE CITY OF MUSCATINE,
Appellees.

Appeal from the District of Iowa.

STATEMENT OF CASE.

The complainant, in the court below, filed his bill in equity, alleging himself to be a judgment creditor of said city—that he had issued execution on his said judgment, and that the same had been returned *nulla bona*.

The bill further alleges that on the 13th of August, 1855, the City Council of the City of Muscatine, in pursuance of authority vested in it by the charter of said city, submitted to the voters of said city a proposition to authorize the said City Council to borrow the sum of $130,000, to be subscribed as stock in the Mississippi and Missouri Railroad Company, and to issue the bonds of the city, bearing ten per centum interest, therefor; that a majority voted in favor of such proposition at such election; that said bonds were issued; that complainant became the owner of some of said bonds; that the interest on said bonds not being paid, suit at law in the said Circuit Court was brought on such unpaid interest, and on the 20th day of October, 1864, he recovered judgment against the said city for the sum of $7,666, with six per centum; that execution was issued thereon, and re-

turned *nulla bona*; that the said City of Muscatine has no property liable to execution at law; and that the Mayor and Aldermen of said city have been requested to levy a tax to pay the same, and have refused so to do. That the said City Council is empowered by its charter to levy a tax of one per centum on the valuation of the property of said city, and that such tax has been, and usually is, levied by the said Mayor and Aldermen every year; that said tax constitutes the chief source of revenue for said city, and yearly amounts to sufficient to pay said judgment; that defendants have not paid said judgment, but have appropriated their money to other purposes; that the said City of Muscatine is insolvent and unable to pay its debts from any other source than from revenues derived from taxation, and the complainant prays that defendants be directed to levy a tax of one per centum for 1865—to appropriate so much as may be required to pay said judgment, interest and costs, and that the Mayor and Aldermen may be restrained from appropriating their revenue to any other purpose than the payment of the judgment, until the same is paid. Service was had upon the defendants August 28th, 1865.

ANSWER.

The answer was filed October 3d, 1865, and admits that an election was held to authorize the borrowing, on the bonds of the city, of the sum of $130,000, to be subscribed as stock, in the name of said city, to the capital stock of the Mississippi and Missouri Railroad Company, and that at such election a majority voted therefor—and that some time thereafter the bonds of the said city, to the amount of $130,000, at ten per cent. interest, payable semi-annually in New York, were issued and delivered to said Railroad Company, but it is denied that the submission of the proposition to borrow money for such purpose was in pursuance of authority vested in said city by its charter, and charges that the same was without the warrant or sanction of law, and for objects and purposes entirely foreign to the objects and purposes for which said corporation was created and intended, and that it was, and is, wholly unauthorized by the charter of said city.

It is further alleged that one per centum is the maximum rate of taxation allowed by the charter of said city, and that the City

Council, before they had knowledge of the institution of this suit, and before service of the same was had upon them, on the 5th day of August, 1865, had levied a tax of one per centum upon the value of all property subject to taxation for general city purposes; that the valuation of property in said city amounted to the sum of $1,890,175, yielding a total revenue, if the taxes should all be collected, of $18,901.75. That of this sum, five mills, or the one-half thereof, has been appropriated and set apart especially for work, labor, material, &c., on the roads and other highways, and the remainder appropriated to all other city purposes, including the payment of debts and liabilities owing by the city; that the road or street tax has always been a separate, distinct and special charge, and that persons charged with taxes due for roads, streets, &c., under the general law of the State, as well as the local law of the city, have the right to pay the same by work and labor done on the roads, streets, &c., under the direction of the Street Commissioner, and that more or less of the road or street tax is always paid in such work. That the chief and almost the only source of revenue upon which the city can depend for the support of its government and the furtherance of the objects of its incorporation, is derived from taxes; that it may realize some $400 more from licenses, shows, &c.

The answer then proceeds to give a detailed statement of the various purposes for which the revenue will be needed and the various sums estimated for such purposes, and shows that the revenue for that year will all be needed for proper municipal objects. It then proceeds to state the amount of indebtedness then owing by the city, being as follows: For floating and funded debt, $26,752.39; for interest due on bonds delivered to Mississippi and Missouri Railroad Company, $104,000; interest on such interest, $19,110; making a total indebtedness, exclusive of principal on said bonds, of $123,110, making, with the first mentioned indebtedness, the sum of $149,862.39, and this is exclusive of the principal sum called for by the bonds, which is $130,000 more.

The amended answer denies that any request was made of them to levy a tax as alleged in the bill of complaint, and charges that the said defendants had exhausted the taxing power conferred on them, before service of the present proceeding was had on them,

turned *nulla bona*; that the said City of Muscatine has no property liable to execution at law; and that the Mayor and Aldermen of said city have been requested to levy a tax to pay the same, and have refused so to do. That the said City Council is empowered by its charter to levy a tax of one per centum on the valuation of the property of said city, and that such tax has been, and usually is, levied by the said Mayor and Aldermen every year; that said tax constitutes the chief source of revenue for said city, and yearly amounts to sufficient to pay said judgment; that defendants have not paid said judgment, but have appropriated their money to other purposes; that the said City of Muscatine is insolvent and unable to pay its debts from any other source than from revenues derived from taxation, and the complainant prays that defendants be directed to levy a tax of one per centum for 1865—to appropriate so much as may be required to pay said judgment, interest and costs, and that the Mayor and Aldermen may be restrained from appropriating their revenue to any other purpose than the payment of the judgment, until the same is paid. Service was had upon the defendants August 28th, 1865.

ANSWER.

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It is further alleged that one per centum is the maximum rate of taxation allowed by the charter of said city, and that the City

Council, before they had knowledge of the institution of this suit, and before service of the same was had upon them, on the 5th day of August, 1865, had levied a tax of one per centum upon the value of all property subject to taxation for general city purposes; that the valuation of property in said city amounted to the sum of $1,890,175, yielding a total revenue, if the taxes should all be collected, of $18,901.75. That of this sum, five mills, or the one-half thereof, has been appropriated and set apart especially for work, labor, material, &c., on the roads and other highways, and the remainder appropriated to all other city purposes, including the payment of debts and liabilities owing by the city; that the road or street tax has always been a separate, distinct and special charge, and that persons charged with taxes due for roads, streets, &c., under the general law of the State, as well as the local law of the city, have the right to pay the same by work and labor done on the roads, streets, &c., under the direction of the Street Commissioner, and that more or less of the road or street tax is always paid in such work. That the chief and almost the only source of revenue upon which the city can depend for the support of its government and the furtherance of the objects of its incorporation, is derived from taxes; that it may realize some $400 more from licenses, shows, &c.

The answer then proceeds to give a detailed statement of the various purposes for which the revenue will be needed and the various sums estimated for such purposes, and shows that the revenue for that year will all be needed for proper municipal objects. It then proceeds to state the amount of indebtedness then owing by the city, being as follows: For floating and funded debt, $26,752.39; for interest due on bonds delivered to Mississippi and Missouri Railroad Company, $104,000; interest on such interest, $19,110; making a total indebtedness, exclusive of principal on said bonds, of $123,110, making, with the first mentioned indebtedness, the sum of $149,862.39, and this is exclusive of the principal sum called for by the bonds, which is $130,000 more.

The amended answer denies that any request was made of them to levy a tax as alleged in the bill of complaint, and charges that the said defendants had exhausted the taxing power conferred on them, before service of the present proceeding was had on them,

and before they had knowledge of its institution. It further alleges that the original charter of said city, granted in 1851, limited the rate of taxation to five mills; that the revenue arising from this rate of taxation being wholly insufficient for the proper government of the city, the Legislature shortly afterwards amended the charter and authorized the levy of a tax not exceeding one per centum on the taxable property of the city.

The charter, and the various amendments made thereto by subsequent legislation, are presented as exhibits, and with them the new burdens thrown upon the treasury of the city by these amendments,—amendments most of which were prior to the vote of the citizens of said city, authorizing it to subscribe for the stock in the Mississippi and Missouri Railroad Company, and in payment of which the coupon bonds of the city were issued, being the same out of which the present suit originally sprang.

ARGUMENT.

We objected to this proceeding in the court below, because we did not think the bill, either in the case made by it or in the relief it sought, presented a subject proper for the interposition of a court of equity. The bill alleges the insolvency of the City of Muscatine, its inability to pay its debts from any other source than from such revenue as it derives from taxation, and prays that it be ordered, adjudged and decreed to levy a tax of one per centum on the taxable property of said city, to appropriate so much of the same as may be necessary to pay said judgment, interest and costs, and that the defendants may be restrained from appropriating any of their city revenue to any other purpose than the payment of said judgment, until the said judgment is satisfied, &c. Equity in general will only lend its aid in cases where the remedy at law is ineffectual or inadequate. This we believe to be not only the broad line of distinction between the two jurisdictions, but the circumstance or necessity that originated and has preserved courts of equity as tribunals separate and distinct from those of law. It is not disputed that there are certain classes of cases over which the courts of law and of equity may exercise concurrent jurisdiction; but these classes are comparatively few, and clearly defined. Nor is it denied that cases may arise in

which it would be proper to invoke the power of a court of equity as auxiliary to a court of law in obtaining satisfaction of its judgments. But the circumstances under which a court of equity would be warranted in extending its aid to a court of law to enforce a satisfaction of its judgments, must not only be very peculiar in themselves, but such as are wholly beyond the powers of a court of law. In other words, to justify the interference of a court of equity in aiding a court of law to obtain satisfaction of its judgments, the court of law must be without any adequate writ, process, or means to reach and subject property and assets, belonging to the judgment debtor, to which the judgment creditor has the right to look for the payment and satisfaction of his judgment; and it follows that if there is any adequate mode or process by which a court of law can get at the property or assets of a defendant to satisfy its judgment, a court of equity refuses to act, and remits the creditor to the court of law to obtain satisfaction of his judgment by proper proceedings issuing out of that court, and fully adapted to the exigency of his case. Where the jurisdiction is concurrent, the court that first obtains jurisdiction of an original case, has, as a general rule, exclusive jurisdiction over it, and where, as in the case at bar, an appeal is made to equity, not as an original proceeding but as a supplemental proceeding, to aid a court of law in obtaining satisfaction of its judgment, to give equity jurisdiction and enable it to act, the court of law must be without any mandatory power to reach the assets in question and subject them to its process. This we think is so manifest from the constitution and offices of the two jurisdictions, as to make either further argument or a reference to authority unnecessary on this point.

Had, then, the court of law which rendered the judgment in favor of plaintiff, any writ or process capable of attaining the same end sought by the bill of plaintiff, viz: of requiring the city authorities of the City of Muscatine to pay his judgment out of the revenues arising from the taxes levied and collected by it? If this judgment is a charge for the payment of which the city can be compelled to make provision out of the revenue it derives from taxation, then the proceeding by mandamus is, we think, not only the proper mode of enforcing the satisfaction of his judg-

ment, but is the only mode by which the City Council can be compelled to make such provision. If we are correct in this view, then the application to equity for relief is not only irregular, but altogether improper. The counsel for the plaintiff, in his printed argument, quotes from *Commissioners of Knox County vs. Aspinwall*, 24 Howard, 376–385, with the apparent purpose of showing that the right to resort to equity, in this case, has received the sanction of this court. We give the extract as we find it in his argument:

"A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgments. It is no objection to the writ of mandamus that the party might possibly obtain another remedy, by a new litigation in a new tribunal."

This extract is not complete, and does not give quite all that the Supreme Court said in that connection. The counsel overlooked a portion of the section which, we think, is of some importance. Immediately following the first period in the above extract, in the published opinion, occurs the following sentence:

"But no court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice."

This, to make the extract entire and connected, ought properly to have been inserted, and is essential to a proper understanding of the court's meaning. If, then, no court under those circumstances would be justified in turning its suitors over to another tribunal to obtain the justice it could itself furnish, we think it equally clear and consonant to principle, that no court would be justified in entertaining jurisdiction in a supplemental proceeding, such as this, where the court in which the judgment was recovered possesses the jurisdiction, and is armed with the process to enforce the satisfaction of its judgment in a manner quite as summary and equally as effectual as could in any event be done in the other. But that decision, so far from countenancing the assumption that cases like these are proper for the interposition of equity, holds language directly the contrary. It says, on page 384:

"If the commissioners either neglect or refuse to perform this plain duty imposed on them by law, the *only remedy* which the injured party *can have* for such refusal or neglect, is the writ of mandamus."

The court would hardly have said that mandamus was the *only remedy* of which the party injured by the neglect or refusal to levy and collect the tax could avail himself, if there was another remedy open to him in a court of equity.

The assertion that the City of Muscatine is insolvent, and una-

ble to pay its debts from any other source than such revenue as it derives from taxation, certainly will not be regarded as establishing any right or foundation for the jurisdiction of equity. The only ~~natural~~ material source of revenue given by the law to municipal corporations springs from the taxing powers it confers on them; and in this respect the City of Muscatine has the same general powers and is subject to the same general conditions that attach to and control all other municipal corporations.

We think, then, that the case at bar is governed by the judiciary act of 1789, which, by its 16th section, expressly provides "that suits in equity shall not be sustained by either of the courts of the United States, where a plain, adequate and complete remedy at law can be had;" and that as the law furnishes such remedy, in this case, equity cannot and will not assume jurisdiction.

We did not, indeed, in the court below, present either a formal plea to the jurisdiction or a formal demurrer. We, however, made the objection at the preliminary stage of the argument, and the court referred to it approvingly in its final decision on the case.

The next point that we present is, the want of authority in the City Council of the City of Muscatine to subscribe for the stock of the Mississippi and Missouri Railroad Company, and to issue the bonds of the city to the amount of $130,000 in payment of such subscription. We approach the consideration of this point with very great hesitation, and with not only a full sense of the difficulties under which we labor in respect to it, but of the apparent or seeming audacity in asking this eminent tribunal to review its former decisions, and to recall or modify the opinions therein expressed. We are, however, to some extent encouraged by the consciousness that this court has not narrowed itself to an inflexible adherence to the rule of *stare decisis*, and that it is ready to receive and properly consider any new light that may tend to elucidate questions of very great importance to the parties before it. In presenting this branch of the case, we shall endeavor to avoid positions which have hitherto been presented to the court, and the weight and force of which have already been passed upon.

The original charter of the City of Muscatine was granted in 1851. It prohibited the City Council from levying any greater tax than the one-half of one per centum on its taxable property.

At this time but little more than four years had elapsed since the admission of Iowa as a State of the Union. The census of 1850, hardly completed when the city was incorporated, showed a population in the State barely sufficient to entitle her to two representatives in the lower house of the National Congress. She had not, at the time, a foot of railroad in the entire State, although it may be probable that railroads were then projected. The charter, it is true, authorizes the City Council to "borrow money for any object in its discretion." But this discretion was not intended or understood to be one absolute and unlimited in its operation. It was limited, and intended to be limited, to those specific objects and purposes which, by the charter, were in express terms intrusted to, and made obligatory on, the Council, and among these railroads can by no sort of construction be classed. Subsequently the Legislature enlarged the taxing limit and empowered the Council to levy a tax of one per centum on the taxable property of the city. This enlargement of the taxing power was not made to enable the city to subscribe for stock in railroad corporations, but to realize a revenue sufficient to defray the necessary expenses of its government. Under the former rate of five mills, the revenue was inadequate for the local government. The increase was obtained solely with the view to secure a revenue sufficiently large to meet the necessary corporate outlays.

We have referred to this matter as introductory to another feature in this proposition, viz: That it was the intention of the Legislature to confine the revenue of the city to the specific objects and purposes enumerated in the charter. In proof of this we desire to call attention to the policy of the Legislature of Iowa in giving authority to towns and cities to subscribe for railroad stock, or in aid of railroad enterprises. In every single case in which the authority of the Legislature has been given to municipal corporations to subscribe for stock in railroad companies, the Legislature has authorized and directed the levy of an additional tax, over and above the maximum allowed by the charter, to pay the interest and ultimately the principal of the indebtedness thus specially authorized. In no case has the Legislature authorized municipal corporations to subscribe for railroad stock without making provision for a special fund to meet this new obligation, and in no case has this special fund been created by requiring any

portion of the revenue arising from general taxation, or the general taxing power, to be set apart and appropriated for it. This special fund has invariably been produced by the grant of an additional power to tax, coupled with the duty to set apart and appropriate the moneys arising from it, to the payment of the indebtedness occasioned by the railroad subscription. The Legislature has imposed such restrictions on the general taxing power of all municipal corporations in Iowa, as will enable these corporations to realize a revenue just large enough to meet the general expenses and carry out the general objects and purposes of the corporation. If an extraordinary power is asked whereby an extraordinary obligation is created, the Legislature has refused to grant the power, without due provision being made by additional taxation, for satisfying this obligation according to its terms.

In support of this we beg to call the attention of the court to the local acts of the Legislature of Iowa, empowering municipal authorities to make stock subscriptions to railroad enterprises.

The first notice that we have of legislative sanction for railroad subscription, and legislative provision for the payment of this subscription, is in the act incorporating the City of Mount Pleasant. The 17th section of this act gives authority to the city to borrow money, for any purpose, not exceeding $100,000, and to pledge the faith of the city for the payment thereof, provided the question of borrowing be first submitted to the legal voters of the city, and two-thirds of the votes cast be in favor of said loan, and if the required vote approve such loan, the City Council will be authorized *to make an additional* tax, not exceeding three mills on the dollar, to pay any indebtedness created by virtue of the authority granted in this section.

See Laws of Special Session, 1856, page 26.

This section does not in terms authorize the city mentioned, to subscribe for stock in any railroad company, but it is well known that it contemplated such subscription; but whether it did or not, the city named could only involve itself, in any extraordinary sum, by providing for its payment by an additional tax not exceeding three mills, and the money arising from this tax was the source from which such payment was to be made. It was not the intention of the Legislature to charge the general revenue of that city with any part of the burden the city would assume by bor-

rowing under the authority conferred by the section referred to and in substance cited.

At the same session of the Legislature, the charter of the City of Keokuk was amended. Section 9 of this amendatory act, legalizes certain elections held in that city, in which the proposition to subscribe stock, in the name of the city, in certain railroads, received a majority of the votes, also the bonds issued by that city to pay for such subscription, but the same section authorizes, empowers and *directs* the City Council of said city to levy and collect such taxes as may be necessary to pay the principal and interest of such bonds, to be levied and collected in the same manner that *the other annual taxes* of said city are levied and collected.

See Laws of Special Session, 1856, pages 44–45.

At the same session the City of Lyons, and the towns of Maquoketa and Bellevue were authorized to subscribe to the capital stock of railroad corporations, and to issue bonds to aid in the construction of railroads, but the right to exercise this power was coupled with the duty to levy a special tax, not exceeding one per cent. per annum, to constitute a separate fund, to pay interest and principal on the bonds issued in aid of such railroads.

The City of Wapello was authorized to borrow money for any purpose, not exceeding $20,000, the majority of the voters, at an election called for that purpose, voting in favor of such loan. In such case the City Council was authorized and empowered to levy an additional tax, not exceeding three mills on the dollar, to provide means for the payment of the indebtedness so created.

Acts of 1856, pages 71–72.

In 1855, the bonded debt of the City of Davenport was legalized, and the City Council authorized to borrow money and issue bonds binding on the city. If, however, the ordinary city revenue, after the payment of the ordinary city expenses, should be insufficient to pay the interest on the bonds legalized and authorized, the City Council is empowered and directed to levy a special and additional tax to meet such deficiency.

Acts of 1855, Secs. 7–8, page 85.

Various other acts were passed enabling other towns and cities to subscribe for railroad stock, or to borrow money on the faith of the city or town borrowing, but wherever either of these pow-

ers was given, the municipal authorities were empowered and directed to levy additional taxes pledged for the payment of the principal and interest of the bonds issued under such authority. These different acts of the Legislature are referred to for the purpose of showing that the Legislature never contemplated that the general taxing power should be used for any other purposes than to raise revenue to meet the ordinary expenses of the corporation.

The City of Muscatine had no special power to subscribe for railroad stocks or to issue the bonds in question. Had she sought such power at the hands of the Legislature, it is more than probable that the Legislature, adhering to its uniform policy in this respect, would have only granted the power by providing for an additional tax sufficiently large to pay the interest and principal of the bonds, as such interest and principal matured. It is not to be conceived that the Legislature would restrict the city to the levy and collection of a tax of one per centum on the taxable property within it, and yet authorize it to borrow money to an unlimited amount and for purposes foreign to its organization. The election authorizing the issuing of these bonds was held in August, 1855, four years after the city was incorporated. By the issue of these bonds the city took upon herself the payment of $6,500 every six months, with exchange on New York, making, exclusive of exchange, the sum of $13,000 per annum—*an amount then very nearly, if not quite, equal to the total annual revenue of the city derived from taxes.* Ten years afterwards, that is to say in 1865, the city, notwithstanding its growth and the appreciation of all kinds of property within it, on a levy of one per centum, can realize a little less than $19,000. It is hardly possible that the Legislature intended to confer on the corporation the power to contract debts without limit, in aid of objects foreign to the general character of municipal corporations, and undiscoverable in the act which gave it life and defined its powers and duties, or in any subsequent acts amendatory to the original act, of incorporation. It is difficult to conceive that the Legislature had any such intent, when the charter itself forbids the City Council from levying a tax exceeding one per centum on the taxable property of the city—a limitation which was clearly designed to restrain the city authorities from extravagance either in undertaking public works or in borrowing money, and which was

supposed to be equally efficacious in admonishing the City Council to confine the revenues of the city to the legitimate ends of municipal government, and in admonishing those who were asked to become creditors of the city, that its resources were too narrow in amount to serve any other purpose than to discharge its ordinary and current expenses.

The whole history, then, of municipal legislation in the State of Iowa shows that, by restricting the power of taxation, the Legislature intended to make the revenues of municipal corporations subservient solely to an economical administration of the municipal government; and where it has been asked to enlarge the powers of municipal corporations, whose charters differed in no essential particular from that of the City of Muscatine, by authorizing them to subscribe for railroad stock or in aid of the construction of railroads, the grant has been accompanied with the power to levy an additional tax to meet this new and additional burden.

The Supreme Court of Iowa, where there is no express authority in the charter of a municipal corporation to make these subscriptions and issue bonds therefor, has held but one language—and that is, in utter denial of the power of the corporation to make such subscription, or to issue its bonds in payment therefor. While, by a divided bench, it at one period sanctioned the right of counties to make these subscriptions and issue bonds, it must be remembered that there is this difference between counties and municipal corporations—there was no limit to the taxing power of the county. The restrictions that are thrown around municipal organizations in respect to taxations are unknown in county organizations, and while a person might hesitate to invest his money in the bonds of a city, by reason of the narrowness of its income and its duty to apply that income to its proper support, and might thus doubt its power to issue from its want of ability to pay, no such objection could lie to the issues of the county, because no such restrictions or checks are imposed upon it. And hence there is this broad line of distinction between the cities and the counties, a distinction that is vital and all-important, for it will not be presumed that the law gives authority to contract, where it impliedly withholds the means necessary for the execution of the contract, as it does in the case of the City of

Muscatine, where it restricts its taxable power within such bounds as will suffice alone for an economical administration of its affairs.

It is said that Chapter 149, of the Acts of the Fifth General Assembly of the State of Iowa, (1855,) recognizes the right of municipal corporations to make these subscriptions, and to issue their bonds in payment therefor. We give the act in question:

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa* That in all cases where county, or city, or town incorporations have, or may hereafter become stockholders in railroads, or other private companies or incorporations, it shall not be lawful for the County Judges, Mayors, or other agents of such cities or counties, to issue the bonds of their counties or cities until they are satisfied that the contemplated improvement will be constructed through or to their respective cities or counties, within thirty-six months from the issuing and delivery of said bonds, and the proceeds of such bonds shall in all cases be expended within the limits of the county in which said city may be situated: *Provided*, that nothing in this act shall in any way affect corporation rights for any contracts or subscriptions heretofore made with any railroad company or corporation, for the issuing of county corporation bonds.

This act was passed anterior to any of the local acts, expressly conferring upon the municipal corporations therein named, the right to make these subscriptions, and to issue corporate bonds in payment of such subscriptions. That the Legislature did not consider this act as a recognition of the authority claimed, or as affirming any right to engage in such projects, is, we think, evident from its subsequent action, in every case, in which its sanction was sought for the exercise of this authority. For, if the authority existed in the charter, or if this legislative act was regarded as an affirmation of such authority in municipal corporations, it is not to be supposed that corporations would ask for a right they already possessed, or that the Legislature would grant special powers, fully covered by a general enactment. So far from regarding it as a general recognition of this power, it is rather to be regarded as a general limitation attaching to all subsequent grants of this power, and restricting the exercise of the subsequent grant to enterprises in the immediate vicinity of the corporation specially authorized to aid in it. This construction accords and is in harmony with the general legislation of Iowa on this question. Any other construction involves contradiction.

The next point to which we invite the attention of the court is this: The complainant's bill assumes, and his learned counsel argues, that the judgment creditors of the city have a claim on its revenues, superior and paramount to all other considerations. In other words, that it is the duty of the city to appropriate its revenues to the payment of its judgment creditors, to the exclu-

sion of all other claims, even although the payment of these judgments should absorb the entire revenues for years. The answer to this is brief. Municipal corporations are part, and an important, though a subordinate part, of the general government of the State. They are organized in aid of the State government, and are clothed with certain powers and functions, to enable them to perform the parts and discharge the duties allotted to them in government. Public policy, or rather public necessity, dictated their organization, and the same consideration has upheld, maintained and strengthened them. The principle on which it is universally conceded that the right to taxation rests, is its necessity for supporting and maintaining government, and giving to it activity and efficiency. Without an adequate revenue to support and maintain government, whether national, State or municipal, and to enable it to discharge the general duties imposed upon it, by its organic law, government would lose its efficiency, and would cease to furnish protection to its citizens, or secure their welfare. One of the reasons assigned why individuals are debarred from instituting suits and recovering judgments against the State is this: That if permitted to do so, and to have their remedy against its general revenue, its revenues may go to satisfy its creditors, and its citizens thus be left powerless and wholly without the protection of government. These general principles lie at the foundation of all civil government and are applicable to every species or grade of civil government. It therefore follows that it is the duty of every civil government, whether superior or subordinate, to supply itself by the mode pointed out in its organic law, with the means requisite for its vitality and efficiency. This is a duty of which it cannot divest itself, nor can it be neglected without manifest injury and possible destruction to public and to private interests. The City of Muscatine requires its revenue for the purposes for which it is alone authorized to collect revenue, and enforce the collection of revenue,—and that is for the support of its local government. This is the first duty imposed upon the city authorities, and one which they are not at liberty to disregard. If the position assumed by the learned counsel on the opposite side is tenable, and the relief sought in his bill is equitable and proper, its practical result would be seen in the destruction not only of the corporation of Muscatine,

but of many promising and flourishing cities in the Northwest. For, by diverting the means indispensable to its life and vigor, to the payment of its creditors, the corporation would speedily sink into a condition of helpless decreptitude and inanition.

The indebtedness of the City of Muscatine, occasioned directly or indirectly by this railroad subscription, now in judgment, is not less than $100,000, and probably much more than that sum. The prayer in complainant's bill is that the city be prohibited from appropriating any part of its revenue to any other purpose than the payment and satisfaction of the judgment of the complainant until the same is paid. If the relief asked for in this case can and ought to be granted, the other judgment creditors of the city can also ask and obtain similar relief, and thus the revenues of the city will be wholly absorbed for an incalculable length of time, assuming that the city government could exist under such circumstances. But to affirm and try to enforce such right, would be to pronounce the death warrant to the city, for it needs no reasoning to show that it cannot live when the means of life are withdrawn from it.

The learned counsel refers to the case of Coy vs. City of Lyons, 17th Iowa, page 1, in support of his position. An examination of that case will show that it is very far from countenancing the theory he advances. The City Council of Lyons has, by the charter of that city, the right to levy a tax not exceeding one per centum. The plaintiff, a judgment creditor of the city, demanded the levy of a tax, or the appropriation of a part of the tax to be levied, for the payment of his judgment. The City Council refused to levy a special tax or set apart any part of the tax they levied, for the benefit of the plaintiff's judgment, and levied a tax of five mills on the dollar, or just one-half the amount they were authorized to levy. Coy, the plaintiff, applied for a writ of mandamus to compel the Council to make an additional levy. The Council, in their return to the alternative writ, averred that they had an absolute discretion as to the amount of tax they chose to levy, and that the courts had no power to interfere with them in the exercise of this discretion. The court ruled differently, and held that while the Council had a discretion as to the amount of tax necessary for the support of the municipal government, it had no such discretion in dealing with the creditors

of the city, and that as it had not exhausted its taxable power, and as it had admitted that five mills on the dollar was sufficient for general municipal purposes, it was a duty enjoined both by law and morals, to levy an additional tax to the maximum amount, and apply such additional tax to the payment of the judgment debt. This was the sole question presented and this the sole point decided, viz: that the City Council had a discretion as to the amount of tax to levy for the support of the corporation, but where it levied altogether but five mills, with power to levy up to one per centum, it could not refuse to levy the additional five mills, and thus defeat the claims of creditors, by seeking shelter under a supposed discretion. This case recognizes the doctrine for which we contend, viz: that the revenue of the city is to be primarily appropriated to the support of the city government—and it goes further and decides that the City Council are to be the judges of the amount of revenue needed for the support of the city government, and that in determining this amount, the council have a discretion with which the courts will not interfere. This case, then, neither in its nature or its circumstances, or in the points presented and determined by it, gives any encouragement to the theory and views of the learned counsel.

In the case of Porter vs. Thomson, *et. al.*, decided by the Supreme Court of Iowa at June term, 1867, the court say:

"That is to say, after demand, the duty was a continuous one—and if not then practicable, the levy ought to have been made as soon as the law would allow, or as early as legally practicable, and in the performance of this duty the officers are not to neglect the equally imperative duty of providing means to pay the necessary current expenses of the corporation, and should these expenses absorb the whole taxes they are allowed by law to levy, they would not be bound to comply with the demand,—that is to say, if the actual expenses of running the city government required a levy of one per centum, (the maximum rate allowed,) there would be no liability for a refusal to levy more, or to set apart a portion of such levy in payment of the judgment. For the corporation must have the means requisite to its life," &c.

This decision has not yet been reported, and we present in connection herewith, a manuscript copy of it, properly certified.

This action was brought under section 3275 of the Revision of the Laws of Iowa, of 1860, charging the defendants, who compose the City Council of the City of Dubuque, with a failure to levy a special tax to pay a judgment in plaintiff's favor, after being duly requested, &c. This is the first case in which the question as to the right of judgment creditors to claim priority over the city revenue, has been presented to the Supreme Court of Iowa and decided by it. And the court hold that "the corpo-

ration must have the means requisite for its life," and that the officers [i. e., the City Council] are not to neglect the equally imperative duty of providing means to pay the necessary current expenses of the government, though these expenses should absorb the whole taxes which the officers are allowed by law to levy.

It is impossible to conceive language plainer or clearer than that employed by the court in this opinion. The first duty devolving upon the city authorities is to provide the means necessary for the support of the city government, even if these means should absorb the entire revenue. This case, we submit, effectually disposes of the equity of the complainant's bill, and is a full answer to the relief prayed in it. We do not deem it necessary to enlarge upon it. It is the first and only decision of the court of last resort of the State constituting the district from which this appeal is taken, and we are not without hope that this court, on this particular question, will follow its general course, and conform to the decision of the State court.

The learned counsel says that the court below rendered its decision in this case without any evidence whatever. This, to say the least of it, is uncandid, if not singular, in him. Before and at the hearing, in open court, he admitted the truthfulness of the answer filed by the defendants, waived the taking of testimony in support of it, and went into the trial and argued the case on its admitted truthfulness.

The bill alleges a demand by the complainant for the levy of a tax by the defendants to pay his judgment. This the amended answer denies. The learned counsel, in his argument, says that demand was made of the Mayor, but that the Mayor, when he made the affidavit to the answer, had forgotten it. We do not admit this to be so; yet assuming it to be true, still a demand on the Mayor would not be a demand on the City Council—a demand on the head of the city government would not be a demand on its legislative body.

It is shown by the answer that the city authorities had not only exhausted their powers of taxation by a levy to the maximum amount, but that they had actually appropriated the larger portion of it, when service was made on them, and knowledge was had by them, of the pendency of this suit. Their control over the revenue was gone, for they had disposed of it, and when rights, acquired in

good faith, had become vested in it, which the Council could neither withhold nor impair. However willing or anxious the Council might then have been, to set apart any portion of the revenue of the city for the payment of the complainant's judgment, it was then too late; for they could not recall the appropriations they had made. or transfer the rights which others had acquired in and to them.

This attempt to reach and absorb the revenues of a municipal corporation is a mode of sequestration, which we confess is new to us. If the right exists at all in the manner and to the extent claimed, then every civil corporation is at the mercy of those who, by delusive promises, pursuaded them to subscribe for stock and to issue bonds in aid of railroad projects. They cease to serve the purposes of their organization, or to be in any manner instrumental, in securing or providing for the peace, health and welfare of their inhabitants. The continued existence and prosperity of municipal corporations are not only essential to the prosperity of the State, but to their creditors; and if we could conceive that the power existed to sequestrate the entire revenue of a city for a year or even a part of a year, as is claimed, we could realize in the power and its exercise, something of the wisdom of the man who, not content with the golden egg his goose periodically yielded him, in his anxiety to get at all the golden store at once, gave to the goose wounds which not only ended its life, but also all hopes of future returns from it. The City of Muscatine has not, it is true, been very prolific in her yield to her bond creditors. She has, however, thus far, done the best she could, and is willing to do all that a proper regard for other and more imperative municipal demands will enable her to do; but to sequester her revenues on the principle advanced, would totally disable her from doing anything in the future, and leave her a helpless and incapable wreck, with just enough of life to live, but without strength or energy, or power, to command obedience or even respect to her charter and ordinances, and without officers to fill her various positions of trust and power, and to discharge the duties required by these various positions. For however desirable and dazzling office may be to many minds, office, and the labor of office, without pay or emolument, is a very untempting affair, and not at all suited to the practical and provident character of the American people.

We have not seen the opinion of the Judge of the Circuit Court of the United States for Kentucky, in the case of Dennison vs. the City of Covington, but the correctness of some of its conclusions may well be doubted. That, however, was an action by way of mandamus and not in equity, as this is, and expressly preserves from the operation of the writ, moneys appropriated by the city authorities. Besides, special authority had been given by the Legislature to the City of Covington to make the contract in question, which was not the case with respect to the City of Muscatine. The last named city had neither sought nor received such sanction, when it undertook to make the contract which is the basis of this action. At all events it is fully answered by the decision of the Supreme Court of Iowa in the case of Porter vs. Thomson, *et. al.*, to which we have referred and in part quoted.

We therefore submit that the decision of the Circuit Court in this case should be affirmed for the following reasons:

First,—That, as the complainant has a plain, adequate and complete remedy at law, a court of equity, under the express provisions of the 16th section of the Judiciary Act of 1789, as well as upon general principles, is without jurisdiction in this case.

Second,—That the City of Muscatine had not power to enter into the contract upon which the judgment of complainant is founded, as shown by its charter, and the general policy of the State of Iowa in respect to municipal corporations organized under its laws, as that policy is developed in the general history of that State in its legislation creating and restricting them.

Third,—That the relief sought by the bill is inequitable, opposed to public policy and public interests, and if granted, will necessarily be destructive of corporate powers and duties, which the public welfare requires should be preserved and maintained.

WM. F. BRANNAN,
Counsel for Defendants.

Supreme Court---State of Iowa.

JUNE TERM, 1867.

PORTER, Appellant,
vs.
THOMPSON, et. al.
Appeal from Dubuque District Court.

This action is brought under Section 3275 of the Revision, charging the defendants, who compose the Council of the City of Dubuque, with a failure to levy a special tax to pay a judgment in plaintiff's favor, after being duly requested, &c. Verdict for plaintiff, motion for new trial sustained, and plaintiff appeals.

B. W. Poor, for Appellant.

Bissell, Shiras & Ballou, for Appellees.

WRIGHT, J.:

The new trial was asked, and given, because the jury disregarded the instructions and the evidence, and because the verdict was contrary to both. Many and very important questions are discussed by counsel, important not only to the parties to this controversy, but in those bearing upon the rights of all judgment creditors of municipal corporations. For the following reasons we propose to do no more than to state some general views bearing upon the question involved.

I.

In the first place, one member of this Court (Mr. Justice Cole) was not present at the argument, and it is always desirable in a Court of last resort and in a case so important, to have the benefit of a full bench. In the second place, and principally, the new trial was granted, among other grounds, because the jury disregarded the instructions; and it would be inconsistent with all our former rulings to review the case until tried upon the law as expounded by the Court, instead of by the jury. The decisions to this effect are uniform. Savery vs. Busick, 11 Iowa, 487; Caffrey vs. Groone, 10 ib., 548; Jewet vs. Smart, 11 ib., 505; Taylor vs. Cook, 14 ib., 501; Briggs vs. Sawyer, 10 ib., 63. We feel bound, therefore, to affirm the judgment and remand the case for a second trial, when the points can be more fully and distinctly made than seems to have been done on the first. For we may be allowed to say that the instructions were very general, and there is nothing affirmatively showing that many, if any, of the specific points made before us, were brought to the attention of the Court below. Upon some of the questions suggested in argument, we feel quite clear, and therefore pass upon them; as to others we might not be united, and therefore pass them until re-presented, if this should be found necessary, to a full Court.

II.

Appellees suggest that the Statute in question is in conflict with Section 29, Art. 3 of the present, and Section 26, Art. 3, of the old, Constitution. The argument is that these sections of the Statute are found in an act entitled "The Code of Civil Practice," and in the particular sub-division entitled "Executions"—that they have nothing to do with civil practice nor with executions—that they are not therefore embraced in the title—nor is the matter thereof connected with the object or subject of the act itself. Upon this subject we have no difficulty. Chapter 125 of which these sections form a part, relates to executions—the manner of issuing the same—their levy—their stay—sales thereunder, and the appraisement of the property taken under the writ; and that this is a legitimate part of a code of civil procedure, no one can for a moment doubt. The preceding section (3274) declares what property of a city or other civil corporation is exempt from

execution. The next points out the duty of the officers in meeting and providing means for the payment of judgments recovered against the corporation—and the next declares the consequences to them personally for a failure to comply with the requirements of the law. If this is not, in the strictest and fullest sense, "matter properly connected" with the subject of the enactment, and with the subject expressed in the title—if it is not a legitimate part of the "one subject" embraced therein, then the evils resulting would be infinitely greater than those sought to be remedied. This subject is discussed at length, and the meaning and purpose of the constitutional provision in question stated in the following cases, and to these we refer without extending the argument: Santo vs. The State, 2 Iowa, 209; Sher vs. County Judge, ib., 280; Morford vs. Unger, 8 ib., 85; Whiting vs. City of Mt. Pleasant, 11 ib., 482; Duncombe vs. Prindle, 12 ib., 1.

III.

These sections are a part of the Revision passed in 1860—do not pretend to be, nor are they in any just sense amendments to the Charter of any city, and are therefore not in conflict with Sec. 30, Art. 3, of the Constitution. They neither incorporate a city or town, nor do they amend any act creating a municipal corporation. They merely point out a remedy for enforcing judgments when recovered against such corporations. As well might it be claimed that the Legislature could not declare the remedy against a road supervisor—a road district—a county or a township for a failure to keep roads in repair, because the Constitution in the same section declares that no special law shall be passed for laying out, opening or working highways. Nor is this a special law within the meaning of the Constitution. If the sections in question related alone to the City of Dubuque there might be some force in the objection.

IV.

It was held in Oswald vs. Thedinger, et al., 17 Iowa, 13, that the creditor was not compelled to take scrip in payment of his judgment, and further that the officers were individually liable after a demand to levy the tax, if within their power under the law, and a refusal to comply with such demand. With this view of the Statute we are still content. Of course, as there suggested,

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if the taxing power was at that time or for that year exhausted, there would be no liability for the failure. For the Statute must be construed in connection with the taxing power of the corporation. It was not intended that a special levy should be made, which with prior or existing levies would exceed the maximum rate or per centage fixed in the charter. But while the demand may have been for a levy forthwith—and the law is that the levy shall be made as early as practicable—a failure to make the proper levy for the succeeding year—if there was no legal impediment, would make the officers liable, without any new demand. That is to say, after demand the duty was a continuous one—and if not then practicable, the levy ought to have been made as soon as the law would allow or as early as legally practicable. And in the performance of this duty, the officers are not to neglect the equally imperative duty of providing means to pay the necessary current expenses of the corporation, and should these expenses absorb the whole taxes which the officers are by law allowed to levy, they would not be bound to comply with the demand. That is to say, if the actual necessary expenses of running the city government required a levy of one per cent., (the maximum rate allowed,) there would be no liability for refusing to levy more—nor for a failure to set apart a portion of such levy in payment of the judgment. For the corporation must have the means requisite to its life, and yet the officers under the pretense of providing for "current expenses" must not cover up funds not necessary for that purpose and which should be applied to the payment of the creditors of the corporation. They must act in good faith. The rights of individuals, as well as the credit of the corporation represented by them, and the law, demands this.

V.

If the officers discharged their duty under the law, they are not liable. If they did not, they are. The law points out the duty. When applied to they must levy the tax, unless there is some legal ground qualifying the refusal. If they do use the means given them by law, there is of course no liability. If they do not, it is a misuse of terms to say that they are made liable for "an honest failure to perform an official duty." When entering upon their duties, they assume responsibilities attaching to their positions.

They become public agents, and must necessarily, in many cases, at their peril, act upon subjects affecting the interests of individuals and the public. They may mistake the law, and honestly so, but such mistakes no more protect them from liability than if they were not acting in an official capacity. Individuals cannot claim protection upon this ground, and no more should those in public stations. The sum recoverable for this failure is not a fine, a punishment—a punishment excessive, within the meaning of Sec. 17, Art. 1, of the Constitution, but the damages which the law adjudges to the individual as the consequence of a failure to discharge an official duty. We do not stop to enquire whether all would be liable if some were in favor of the levy, for no such question is made in this record. But the Mayor, as he is, by the charter, presiding officer of the Council, and has at least the casting vote in case of a tie, would be equally liable with the Aldermen or Councilmen. That is to say, the duty to make the levy is one devolving upon him, in common with the other officers of the corporation having a voice therein. He is not therefore exempted from liability, by reason of his position. As already suggested, other questions are made, upon which at present, for the reasons before stated, we intimate no opinion. Thus whether a judgment creditor would be entitled to this remedy if the officers made a levy of all that the charter allowed to pay debts after providing for the current expenses and for roads, without making it for the specific purpose of paying the judgment in question—whether plaintiff by her demand was entitled to priority of payment over other judgment creditors—and whether if a sufficient levy was made generally, there would be liability for a failure to *appropriate* the tax after or before its collection; these questions (and there may still be others which do not now occur to us) somewhat novel, and especially so in our view of this peculiar Statute, we leave open, for re-discussion and further consideration, should they arise upon a second appeal.

AFFIRMED.